

# Recognition as an Affirmative Step in the Decolonization Process: The Case of Western Sahara

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Sooner or later, but sooner rather than later, our continent will be purged of all forms of colonialism, for the fire of intense nationalism is blazing all over Africa and burning to ashes the last remnants of colonialism.

Kwame Nkrumah, *I Speak of Freedom*

## Introduction

The right of colonial peoples to self-determination is a widely accepted norm of customary international law.<sup>1</sup> This right has been recognized and affirmed by the United Nations and other international bodies, including the International Court of Justice, as the principal right at stake in decolonization.<sup>2</sup> In the case of Western Sahara, a former colonial possession of Spain, self-determination has been thwarted since 1975 by Moroccan military occupation.<sup>3</sup> As of February 28, 1976,

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1. Self-determination has been defined as "the right of a nation to constitute an independent state and determine its own government for itself," A. COBBAN, NATIONAL SELF-DETERMINATION 45-46 (1945), or, "the need to pay regard to the freely expressed will of peoples," Advisory Opinion on Western Sahara, [1975] I.C.J. 12, 33.

2. Advisory Opinion on Western Sahara, [1975] I.C.J. 12, 32. The principle of self-determination as a right of all peoples, and its application for the purpose of decolonization, was first enunciated by the General Assembly in the Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15 U.N. GAOR, Supp. (No. 16) 66, U.N. Doc. A/4684/Add.1 (1960) [hereinafter cited as Res. 1514 (XV)]. Since the adoption of that resolution, and of G.A. Res. 1541, 15 U.N. GAOR, Supp. (No. 16) 29, U.N. Doc. A/4684/Add.1 (1960) [hereinafter cited as Res. 1541 (XV)], which established additional standards for decolonization, the General Assembly and its various committees have applied this principle, with few exceptions, in their efforts to decolonize Africa, Asia, and Central and South America.

3. See text accompanying notes 66-82 *infra*. Western Sahara lies along the Atlantic coast of northwest Africa directly opposite the Canary Islands. It has a total area of about 266,000 square kilometers and a seacoast of 1,062 kilometers. Its frontier with Morocco and Algeria is 475 kilometers long, and that with Mauritania is 1,570 kilometers. The indigenous inhabitants of Western Sahara are nomadic. According to a 1974 census, 73,497 Saharans and 20,126 Europeans lived in the Territory. The coast of Western Sahara is extremely hazardous for shipping, a fact that has prevented the Territory from participating on any large scale in the commercial exploitation of the rich fishing resources of its continental shelf. The Territory has extensive deposits of phosphate in the Bu Craa region, only 97 kilometers from the coast. Large-scale mining and exportation of this resource began in 1974 under the direction of FOSBUCRAA, a wholly-owned subsidiary of the Instituto Na-

the Frente Popular para la Liberación de Saguia El Hamra y Rio de Oro (Frente POLISARIO), the dominant political organization in Western Sahara,<sup>4</sup> had declared the establishment of the Saharui Arab Democratic Republic (SADR).<sup>5</sup> The SADR government in exile and the Frente POLISARIO, headquartered in Algiers, are currently engaged in a war with Morocco seeking to acquire effective control over Western Sahara. Although efforts are currently underway to end the conflict,<sup>6</sup> the lack of a concerted international effort to pressure Morocco to withdraw its armies from Western Sahara and thereby permit effective realization of the right to self-determination by the Saharwi people may be viewed as a reason for the current stalemate in the region.

This Article examines the events leading to the juridical affirmation of the right of the Saharwi people to self-determination, subsequent actions on the part of third States that frustrated the realization of that right, the founding of the SADR, and relevant international developments since 1976. The theory and practice of recognition with regard to States and governments-in-exile are analyzed in order to develop the theoretical framework on which the thesis of this Article rests, namely, that recognition of the SADR government-in-exile and recognition of Frente POLISARIO claims to participation are consistent with the right of colonial peoples to self-determination and thereby with the peremptory norm of international law with respect to decolonization.<sup>7</sup>

cional de Industria, a Spanish concern. In 1975, it was projected that Western Sahara at full production would produce 10 million metric tons of phosphates per year, making it the second largest exporter of phosphate after Morocco. In the early 1960's, a search for petroleum in the northern part of the Territory yielded no positive results, but it was reported in 1975 that four companies held prospecting concessions in the coastal waters. Report of the United Nations Visiting Mission to Spanish Sahara, 1975, in the Report of the Special Committee on the Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 30 U.N. GAOR, 3 Supp. (No. 23) 26-28, 40, U.N. Doc. A/10023/Add.5, Annex (1975) [hereinafter cited as Report of the Visiting Mission to Spanish Sahara].

4. The 1975 United Nations Visiting Mission found overwhelming popular support for the Frente POLISARIO. Report of the Visiting Mission to Spanish Sahara, *supra* note 3, at 7. Currently, two political organizations claim as yet unmeasured support among the Saharwi people in Western Sahara and the Saharwi refugees in Morocco. Both these organizations are pro-Morocco and favor integration of Western Sahara into Morocco. See 35 U.N. GAOR, C.4 (15th mtg.) 3-9, U.N. Doc. A/C.4/35/SR.15 (1980) (statements of representatives of Front de libération du Sahara and of Mouvement des originaires de la Sakiet-el-Hamra et du Rio de Oro (AOSARIO)). These organizations have been denounced as puppets of Morocco who do not represent the Saharwi people. 35 U.N. GAOR, C.4 (21st mtg.) 15, U.N. Doc. A/C.4/35/SR.21 (1980) (statement of representative of Algeria).

5. See note 82 *infra*.

6. See text accompanying notes 227-31 *infra*.

7. The term "colonial" in this Article is meant to be interpreted in a strictly judicial manner, and not in the larger sociological sense. That is, the term "colonial" is meant to

The year 1975 was critical to the decolonization of Western Sahara. In 1975, the Fourth Committee of the General Assembly sent a Visiting Mission to the Territory,<sup>8</sup> and the International Court of Justice rendered an Advisory Opinion on Western Sahara,<sup>9</sup> the results of which both politically and legally defeated Moroccan and Mauritanian claims of historic title to Western Sahara. Prior to 1975, the General Assembly had consistently manifested its support for the right of the Saharwi people to self-determination by adopting nine resolutions on the question of Western Sahara.<sup>10</sup> Yet in December, 1975, confronted with continued Moroccan and Mauritanian occupation of Western Sahara, the General Assembly reversed its position of steadfast commitment to self-determination for the Saharwi people.<sup>11</sup> The implications of this shift for a peaceful solution to the Western Sahara conflict will be examined in the appraisal of policy options.<sup>12</sup>

## I. The Case of Western Sahara: A Conflict of Principles

The case of Western Sahara has appeared on the agenda of the Fourth Committee of the General Assembly since 1963.<sup>13</sup> From the beginning of the controversy, the issue at stake involved a determination as to which of two competing peremptory principles, *jus cogens*, of international law should be applied in the decolonization of Western Sahara: the right of the Saharwi people to self-determination or the

refer only to those territorial entities which, in U.N. practice, have been considered colonies of a European power, or more recently, overseas dependencies of the United States. There remain a number of territorial communities that have yet to achieve independence. See generally Report of the Special Committee on the Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 34 U.N. GAOR, 2 Supp. (No. 23) 1, U.N. Doc. A/34/23/Add.1 (1979) [hereinafter cited as 1979 Report of the Special Committee on Decolonization].

8. Report of the Visiting Mission to Spanish Sahara, *supra* note 3. See text accompanying notes 38-51 *infra*.

9. Advisory Opinion on Western Sahara, [1975] I.C.J. 12. See text accompanying notes 52-65 *infra*.

10. G.A. Res. 2072, 20 U.N. GAOR, Supp. (No. 14) 59, U.N. Doc. A/6014 (1965) [hereinafter cited as Res. 2072 (XX)]; G.A. Res. 2229, 21 U.N. GAOR, Supp. (No. 16) 72, U.N. Doc. 6316 (1966) [hereinafter cited as Res. 2229 (XXI)]; G.A. Res. 2354, 22 U.N. GAOR, Supp. (No. 16) 53, U.N. Doc. A/6716 (1967); G.A. Res. 2428, 23 U.N. GAOR, Supp. (No. 18) 63, U.N. Doc. A/7218 (1968); G.A. Res. 2591, 24 U.N. GAOR, Supp. (No. 30) 73, U.N. Doc. A/7630 (1969); G.A. Res. 2711, 25 U.N. GAOR, Supp. (No. 28) 100, U.N. Doc. A/8028 (1970); G.A. Res. 2983, 27 U.N. GAOR, Supp. (No. 30) 84, U.N. Doc. A/8730 (1972); G.A. Res. 3162, 28 U.N. GAOR, 1 Supp. (No. 30) 110, U.N. Doc. A/9030 (1973); G.A. Res. 3292, 29 U.N. GAOR, Supp. (No. 31) 103, U.N. Doc. A/9631 (1974) [hereinafter cited as Res. 3292 (XXIX)].

11. This about-face occurred with the adoption of G.A. Res. 3458, 30 U.N. GAOR, Supp. (No. 34) 116-17, U.N. Doc. A/10034 (1975). See text accompanying notes 78-81 *infra*.

12. See text accompanying notes 221-41 *infra*.

13. 18 U.N. GAOR, C.4 (1506th mtg.) 519, 522-23, U.N. Doc. A/C.4/SR.1506 (1963).

right of Morocco and Mauritania to have their national unity and territorial integrity respected.<sup>14</sup>

The General Assembly first addressed the issue of decolonization of Western Sahara in Resolution 2072(XX)<sup>15</sup> of December 16, 1965. At that time, the Assembly reaffirmed the inalienable right of colonial peoples to self-determination in accordance with the principles embodied in Resolution 1514(XV),<sup>16</sup> and urgently requested Spain, as the Administering Power, “. . . to take immediately all necessary measures for the liberation of the Territories of Ifni and Spanish Sahara from colonial domination, and, to this end, to enter into negotiations on the problems relating to sovereignty presented by these two Territories.”<sup>17</sup>

Resolution 2072(XX) envisioned the decolonization of Western Sahara through a process of negotiation between Spain and the Special Committee.<sup>18</sup> No reference was made in the Resolution to the proce-

14. The two competing norms are embodied in paragraphs 2 and 6 of General Assembly Resolution 1514:

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

. . . .

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purpose and principles of the Charter of the United Nations.

Res. 1514 (XV), *supra* note 2.

15. Res. 2072(XX), *supra* note 10.

16. Res. 1514 (XV), *supra* note 2.

17. Res. 2072 (XX), *supra* note 10, at para. 2. Ifni, the smaller of the two Territories, was regarded as a “colonial enclave,” a small territory surrounded on all sides by an independent State, in this case Morocco. United Nations practice with respect to colonial enclaves has been to deny the indigenous population the right to self-determination on the assumption that the territory concerned should be integrated into the surrounding State. As a principle of international law, integration is relevant only in the most limited circumstances, that is, to tiny territories ethnically and economically parasites of, or deriving from that State, and that cannot be said in any legitimate sense to constitute separate territorial units. The principle is not applicable to larger, more viable territories such as Western Sahara. J. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 384 (1979). See also A. RIGO-SUREDA, *THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION* 214-20 (1973).

The prerequisites to integration as a mode of self-determination are set out in Principle IX of Res. 1541 (XV), *supra* note 2. Thus far, four territories have been integrated with other States on grounds of national unity rather than self-determination for the territories themselves: Goa and dependencies, and French Establishments in India (India); Ifni (Morocco); and Sao Joao Batista de Adjuda (Dahomey). J. CRAWFORD, *supra* at 370.

18. The Special Committee on the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, created in 1961, is the only U.N. body concerned exclusively with matters relating to dependent and non-self-governing territories. The Committee was created by the General Assembly by G.A. Res. 1654, 16 U.N. GAOR, Supp. (No. 17) 65, U.N. Doc. A/5100 (1961). Pursuant to its purpose, the Special Committee may consult with the administering powers of the dependent and non-self-governing territories, send visiting missions and commissions of inquiry to dependent and non-self-governing territories, observe and supervise elections and plebiscites, and receive petitions

ture by which the Saharwi people would exercise their right to self-determination. This specific question was not addressed until the General Assembly adopted Resolution 2229(XXI)<sup>19</sup> on December 20, 1966.

In sum and substance, Resolution 2229(XXI) was the strongest, most definitive statement by the General Assembly concerning Western Sahara to date. It became the model for all subsequent resolutions until Resolution 3292(XXIX)<sup>20</sup> was adopted in 1974. The Resolution contained four significant policy and procedural declarations concerning the decolonization of Western Sahara:

1) The right of the Saharwi people to self-determination was affirmed as the paramount legal right in the decolonization of Western Sahara.<sup>21</sup>

2) A referendum conducted under the auspices of the United Nations would be utilized to ensure self-determination for the Saharwi people.<sup>22</sup>

3) The General Assembly implicitly rejected Moroccan and Mauritanian claims to sovereignty over Western Sahara, yet recognized the existence of such claims, valid or otherwise, by granting the two States *locus standi* to negotiate with Spain and any other interested party concerning the procedures for conducting the referendum.<sup>23</sup>

4) All exiles would be freely allowed to return to Western Sahara to participate in the referendum, the privilege of voting in which would be extended to indigenous Saharans only.<sup>24</sup>

The final noteworthy feature of Resolution 2229(XXI) lies in the operative paragraph 5 by which the General Assembly requested the Secretary General, in consultation with Spain and the Special Committee, to appoint a special mission to be sent to Western Sahara . . . "for the purpose of recommending practical steps for the full implementation of the relevant resolutions of the General Assembly, and in particular for determining the extent of United Nations participation in the preparation and supervision of the referendum. . . ."<sup>25</sup>

The essence of Resolution 2229(XXI) was repeated, with minor changes, in subsequent resolutions of the General Assembly. The

from dependent and non-self-governing territories. See generally A. RIGO-SUREDA, *supra* note 17, at 294-323.

19. Res. 2229 (XXI), *supra* note 10.

20. Res. 3292 (XXIX), *supra* note 10.

21. Res. 2229 (XXI), *supra* note 10, at para. 1.

22. *Id.* para. 4.

23. *Id.* paras. 3, 4.

24. *Id.* paras. 4(a), 4(b).

25. *Id.* para. 5.

changes made reflected the volatile political climate in Western Sahara.<sup>26</sup> As the Saharwi people began to express discontent with their colonial status, the General Assembly responded, in 1970, with Resolution 2711(XXV),<sup>27</sup> calling upon Spain to take effective measures to create the atmosphere of *détente* required for the orderly administration of a referendum. Therein, the General Assembly acknowledged the legitimacy of the struggle of the Saharwi people,<sup>28</sup> called upon all States to provide them with all necessary assistance,<sup>29</sup> and invited all States to refrain from making investments in the Territory in order to hasten self-determination for the Saharwi people.<sup>30</sup>

Preferring not to second-guess the Saharwi people, the General Assembly was careful not to make an explicit reference to the future status of Western Sahara in the Resolution. By 1972, the intensity with which the question of self-determination for the Saharwi people was discussed in the international community<sup>31</sup> and the heightened political awareness of the Saharwi people combined to produce the near certainty that a referendum would lead to independence for Western Sahara. The General Assembly acknowledged this sentiment, and in Resolution 2983(XXVII)<sup>32</sup> reaffirmed the inalienable right of the Saharwi people not only to self-determination, but also to independence. By requesting States to give "all necessary moral and material" assistance to the Saharwi people in their legitimate struggle, in conformity with U.N. practice, this resolution expanded the necessary assistance called for in Resolution 2711(XXV).<sup>33</sup>

26. G.A. Res. 2354, 22 U.N. GAOR, Supp. (No. 16) 53, U.N. Doc. A/6716 (1967); G.A. Res. 2428, 23 U.N. GAOR, Supp. (No. 18) 63, U.N. Doc. A/7218 (1968); G.A. Res. 2591, 24 U.N. GAOR, Supp. (No. 30) 73, U.N. Doc. A/7630 (1969).

27. G.A. Res. 2711, 25 U.N. GAOR, Supp. (No. 28) 100, U.N. Doc. A/8028 (1970).

28. *Id.* para. 8.

29. *Id.*

30. *Id.* para. 7.

31. See Report of the Special Committee on the Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 27 U.N. GAOR, 4 Supp. (No. 23) 30, U.N. Doc. A/8723/Rev.1 (1973).

32. G.A. Res. 2983, 27 U.N. GAOR, Supp. (No. 30) 84, U.N. Doc. A/8955 (1972).

33. *Id.* para. 2. Conditions in the Territory remained essentially unchanged until 1973. Spain in effect ignored the mandate of repeated General Assembly resolutions which called for a referendum and the establishment of a visiting mission on the grounds that, because of the nomadic nature of the population and the physical features of Western Sahara, preparation for an act of self-determination by the Saharwi people could not be hurried. Letter dated Sept. 8, 1966, from the Permanent Representative of Spain to the United Nations addressed to the Chairman of the Special Committee, 21 U.N. GAOR, 1 Annexes (Addendum to Agenda Item 23) 621, U.N. Doc. A/6300/Rev.1 (1966). This argument conflicts with the principle of paragraph 3 of Res. 1514(XV), *supra* note 2, that political, economic, social, and educational unpreparedness should never serve as a pretext for delaying independence.

At this time the Djemaa, or General Assembly of the Sahara, was the highest representative body in the Territory. See Report of the Visiting Mission to Spanish Sahara, *supra* note

Confronted with increased pressure from U.N. Member States expeditiously to decolonize Western Sahara, Spain stated in July, 1974 that it would soon issue a new Political Statute for the Territory.<sup>34</sup> To everyone's surprise, Spain then announced that a referendum would be held in Western Sahara, under U.N. auspices, during the first six months of 1975.<sup>35</sup> Subsequently, on December 13, 1974, the General Assembly adopted Resolution 3292(XXIX), that requested the Special Committee to send a visiting mission to Western Sahara and called on the International Court of Justice to render an advisory opinion on the following questions:

I. Was Western Sahara (Río de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)?

If the answer to the first question is in the negative,

II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?<sup>36</sup>

The General Assembly took the position that the submission of the legal questions to the Court was "without prejudice to the application of the principles embodied in General Assembly resolution 1514(XV)."<sup>37</sup>

#### A. *The U.N. Visiting Mission*

During the months of May and June, 1975, the Visiting Mission traveled to Spain, Morocco, Mauritania, Algeria, and Western Sahara with the purpose of ascertaining the wishes of the indigenous Saharans and

3, at 29-30. In 1973, the Djemaa adopted a statement, *reprinted in* Letter dated Sept. 28, 1973, from the Permanent Representative of Spain to the United Nations addressed to the Secretary-General, U.N. Doc. A/9176, Annex I (1973), to the effect that the future of the Saharwi people should be decided through a referendum. Generalissimo Franco responded by addressing to the Djemaa a decree that granted it increased legislative power, acknowledged the Saharwi peoples' ownership of the Territory's natural resources and the proceeds of its development, and reiterated Spain's guarantee that the population of Western Sahara would freely determine its future when it so requested. The decree granted the Djemaa a substantial increase in control over the internal affairs of the region and all rights inherent in Spanish nationality, but reserved to Spain control over external affairs, the right to defend the region, and certain veto powers over actions of the Djemaa. Letter dated Sept. 28, 1973, from the Permanent Representative of Spain to the United Nations addressed to the Secretary-General, U.N. Doc. A/9176, Annex IV (1973).

It was also during 1973 that the popular liberation movements in Western Sahara began to take an active role in hastening the decolonization process. The Frente POLISARIO was formed on May 10, 1973, and ten days later launched its first attack against the Spanish at El Kharga. *See generally* Report of the Visiting Mission to Spanish Sahara, *supra* note 3, at 62-64.

34. Letter dated July 10, 1974, from the Permanent Representative of Spain to the United Nations addressed to the Secretary-General, U.N. Doc. A/9655 (1974).

35. Letter dated Aug. 20, 1974, from the Permanent Representative of Spain to the United Nations addressed to the Secretary-General, U.N. Doc. A/9714 (1974).

36. Res. 3292 (XXIX), *supra* note 10.

37. *Id.* para. 1.

the views of the concerned and interested States as to how the process of decolonization should proceed in Western Sahara.<sup>38</sup> The Visiting Mission went first to Madrid.

As a result of the deterioration of the situation in Western Sahara, Spain wanted to terminate its presence in the Territory by an orderly transfer of power. Spain wished to include the concerned parties in the decolonization process through negotiation, yet did not wish to arbitrate the competing claims of Morocco and Mauritania. Spain also indicated that the appropriate discharge of its duties in Western Sahara entailed adherence to the relevant General Assembly resolutions so that the transfer of power would be to freely chosen representatives of the indigenous population.<sup>39</sup>

Morocco put forth a claim to Western Sahara on juridical, administrative, socio-economic, and cultural grounds, and argued that its view had been a matter of public record since 1956.<sup>40</sup> Insofar as actual decolonization was concerned, Morocco contended that the decolonization of Western Sahara implied reintegration into Morocco. This claim was based on the theory that Morocco, as a national unit, had been the victim of a unique form of colonial dismemberment: during the colonial period, one part of the national territory became a protectorate of Spain (Western Sahara) while the other became a protectorate of France (Morocco proper). In accordance with the principle of operative paragraph 6 of Resolution 1514(XV)<sup>41</sup> and Resolution 2625(XXV),<sup>42</sup> Morocco asserted that it was merely defending the integrity of its territory. For Morocco, self-determination or the right of Western Sahara to free determination never meant abandoning a part of its territory.<sup>43</sup>

Morocco also denied that the presence of phosphate in the region precipitated its territorial claims; Rabat noted that its claims to Western Sahara, officially announced in 1956, antedated the prospecting for, and discovery of, phosphate in the Territory. Furthermore, Morocco declared that it already had sufficient reserves of phosphate to continue exploiting them for eight more centuries.<sup>44</sup>

38. Report of the Visiting Mission to Spanish Sahara, *supra* note 3.

39. For a more complete discussion of Spain's views, see *id.* at 75-79.

40. For a more complete discussion of the evolution of Morocco's position regarding Western Sahara, see *id.* at 21-23.

41. See note 13 *supra*.

42. G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1970) [hereinafter cited as Res. 2625(XXV)].

43. For a more complete discussion of Morocco's views, see Report of the Visiting Mission to Spanish Sahara, *supra* note 3, at 80-85.

44. *Id.* at 81.



Morocco disapproved of the referendum contemplated by Spain, believing that it would be detrimental to decolonization because it would result in the creation of a puppet State.<sup>45</sup> Morocco, however, indicated that it would accept a referendum if Spain agreed to withdraw troops and administrative personnel from Western Sahara, if the U.N. dispatched troops to the Territory, and if the only question posed in the consultation were "Do you want to remain under the authority of Spain or to rejoin Morocco?"<sup>46</sup>

Mauritania stated that its policy regarding Western Sahara was, and, since 1957, had been based on two principles. First, on the basis of history, geography, and human settlement Western Sahara was an integral part of Mauritania, and second, since 1962, Mauritania had subscribed to the principle of self-determination for the people of Western Sahara.<sup>47</sup> Mauritania perceived no conflict between itself and Morocco regarding claims to Western Sahara, noting that Morocco's claims were based on objective reasons, which Mauritania supported, and that each recognized the rights of the other within its respective sphere of influence.

Mauritania echoed Morocco's concern about a referendum in Western Sahara, citing the lack of trained personnel and the nomadic character of Western Sahara's economic wealth, which would not be viable as an economy acceptable to neo-colonialism. At the time, Spain used the nine years of administration in the Territory and the Visiting Committee's structure of Western Sahara to develop Western Sahara in a way that would thereby insure that rein-

Western Sahara and refugee settlements. The Moroccan refugees in Morocco expressed that those in Mauritania wanted to return to Algeria sought total

of Mauritania's views, see *id.* at 23-

Morocco and Mauritania indicated their support for the efforts of the Frente Polisario. The views of the refugees interviewed, see

The Visiting Mission identified at least four political groups and liberation movements operating in Western Sahara or in refugee camps. Some of these groups claimed support among refugees and political exiles in Morocco and Mauritania. The Visiting Mission focused on the two major political organizations in Western Sahara: the Partido de la Unión Nacional Saharui (PUNS) and the Frente POLISARIO.<sup>49</sup> Prior to the arrival of the Visiting Mission, the degree of popular support for the Frente POLISARIO had not been determined. However, in all the cities on the itinerary of the Visiting Mission, the Frente POLISARIO successfully organized massive demonstrations in support of the independence movement.<sup>50</sup> The success of these demonstrations led the Visiting Mission to conclude

that there was an overwhelming consensus among Saharans within the Territory in favor of independence and opposing integration with any neighbouring country. The differences of opinion which the Mission encountered were concerned not with the objective, but with the means by which it should be achieved and the support given to rival political movements.<sup>51</sup>

#### B. *Advisory Opinion on Western Sahara*

All of the parties to the Western Sahara conflict did not concur in the necessity for an advisory opinion. Spain argued that the Court should refuse to render an advisory opinion and advanced two grounds in support of its claim: (1) Morocco's circumvention of the requirement of consent for a contentious proceeding and (2) the inconsequential nature of the questions to the decolonization of Western Sahara.<sup>52</sup>

In support of the claim that Morocco circumvented the requirement of consent, Spain offered into evidence a letter from King Hassan II to the Spanish Minister for Foreign Affairs requesting a joint submission to the Court of the legal issues concerning title to Western Sahara.<sup>53</sup> The Court dismissed this evidence. It stated that because Spain was a member of the U.N. and had accepted the provisions of the U.N. Charter and the Statute of the Court, it had freely given its consent to the exercise by the Court of its advisory jurisdiction.<sup>54</sup> The Court then proceeded to discuss the indispensable function it must perform to assist

49. For a more complete discussion of the Visiting Mission's observations and conclusions regarding political organizations in Western Sahara, see *id.* at 60-65.

50. For a more complete discussion of the Visiting Mission's observations and conclusions regarding popular demonstrations, see *id.* at 60-67.

51. *Id.* at 48.

52. Advisory Opinion on Western Sahara, [1975] I.C.J. 12, 21.

53. *Id.* at 22.

54. *Id.* at 24.

the General Assembly in the discharge of its duties, concluding it would not refuse to render an advisory opinion based on Spain's claim of Moroccan subterfuge.<sup>55</sup>

In support of the claim that the questions were of an inconsequential nature, Spain argued that the General Assembly had addressed the right of the Saharwi people to self-determination in previous resolutions. The Court rejected this alternative ground, sustaining the propriety of its rendering an advisory opinion.<sup>56</sup> Nevertheless, the Court implicitly recognized the futility of its task and the dangerous consequences of its Advisory Opinion for the decolonization process in Western Sahara when it declared that the right of the Saharwi people to self-determination constituted a basic assumption of the questions before it.<sup>57</sup>

For the purpose of Question I of the Advisory Opinion, the "time of colonization by Spain" was found to be 1884 when Spain proclaimed its protectorate over the Rio de Oro.<sup>58</sup> The Court referred to the law in force at that time to determine the meaning of *terra nullius*. According to state practice in 1884, territories inhabited by tribes or people having any degree of social and political organization were not considered *terra nullius* and hence not ripe for occupation. To acquire sovereignty over such areas agreements had to be concluded with the local rulers. The Court found that, at the time of colonization, the peoples of Western Sahara were socially and politically organized under tribes competent to represent them, and that Spain concluded a valid agreement on December 26, 1884 with the chiefs of the local tribes.<sup>59</sup> The answer to the first question was in the negative and, in accordance with the terms of Resolution 3292(XXIX), the Court addressed itself to the question of the legal ties of the Territory to Morocco and Mauritania. The Court construed the words "legal ties" in light of the purposes of Resolution 3292(XXIX) and concluded that "legal ties" meant such ties as might affect the policy to be followed in the decolonization of Western Sahara.<sup>60</sup>

Morocco presented its claim to legal ties with Western Sahara as a claim of sovereignty based on immemorial possession and an uninterrupted exercise of authority.<sup>61</sup> The Court construed Question II to im-

55. *Id.* at 27.

56. *Id.* at 37.

57. *Id.* at 36.

58. *Id.* at 38.

59. *Id.* at 39.

60. *Id.* at 41.

61. *Id.* at 42.

ply a finding of sovereignty based on an effective display of authority in Western Sahara at the time of colonization and in the immediately preceding period. Morocco's attempt to prove sovereignty was based on certain international acts and treaties that Morocco claimed evinced recognition by other States of its sovereignty over all or part of Western Sahara. The court rejected Morocco's position and found that the ties presented did not amount to legal ties of sovereignty between Western Sahara and the Kingdom of Morocco.<sup>62</sup>

When considering Mauritania's claim, the Court confronted a threshold problem of defining the "Mauritanian entity." The term denoted the cultural, geographic, and social entity within which the Islamic Republic of Mauritania was eventually to be created.<sup>63</sup> The Court found that, although there were certain ties of a racial, religious, linguistic, cultural, and economic nature, the tribes and emirates in the entity were independent of each other. Therefore, the Court concluded, at the time of colonization by Spain, there did not exist between the Territory of Western Sahara and the Mauritanian entity any tie of sovereignty, allegiance of tribes, or membership in the same legal entity.<sup>64</sup>

In spite of the existence at the time of colonization of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in Western Sahara and of some rights constituting legal ties between the Mauritanian entity and Western Sahara, the Court held that neither of these findings established such legal ties as might affect the decolonization of Western Sahara or, in particular, the principle of self-determination through the free and genuine expression of the will of the Saharwi people.<sup>65</sup>

The Advisory Opinion, the propriety of which was in doubt from the moment it was discussed in the Fourth Committee, quashed whatever hopes Morocco and Mauritania had concerning the legal validity of their territorial claims. The right of the Saharwi people to self-determination was juridically affirmed as the paramount legal principle to apply in the decolonization of Western Sahara.

### C. *The "Annexation" of Western Sahara*

After the Court rendered its Advisory Opinion, King Hassan II threatened to conduct a "Green March" into Western Sahara with

62. *Id.* at 56-57.

63. *Id.* at 57.

64. *Id.* at 64.

65. *Id.* at 68.

350,000 Moroccan civilians.<sup>66</sup> Hassan characterized the March as a peaceful means by which Morocco could achieve international recognition of its right to national unity and territorial integrity.<sup>67</sup> The ultimate purpose of the March, however, appears to have been to pressure Spain into negotiating with Mauritania and Morocco concerning sovereignty over Western Sahara before the General Assembly could make the necessary preparations for the referendum in the Territory.

Spain, in response to Hassan's threat and in accordance with Article 35 of the Charter, urged the President of the Security Council to convene an emergency meeting. Madrid sought to dissuade Hassan from proceeding with the March on the grounds that it would jeopardize international peace and security, violate the right of the Saharwi people to self-determination, and contravene the purposes of the Charter.<sup>68</sup> Pursuant to Spain's request, the Security Council called on Morocco to desist from the proposed March on Western Sahara.<sup>69</sup> The report of the Secretary-General pursuant to this Resolution indicated that Spain was not committed to seeking a solution to the crisis in Western Sahara on a bilateral or trilateral basis.<sup>70</sup>

Interstate tension concerning Western Sahara did not abate, and, as a result, the Security Council on November 2, 1975, adopted Resolution 379(1975),<sup>71</sup> reiterating its previous decision, to the effect that all parties interested and concerned should avoid taking any action, unilateral or otherwise, that would further escalate tension in Western Sahara. The report of the Secretary-General pursuant to this Resolution evinced the effects of Moroccan pressure on Spain—the Madrid government indicated that it would now favor a trilateral agreement if the U.N. agreed to accept it.<sup>72</sup>

Nonetheless, two Security Council Resolutions were not sufficient to dissuade Hassan. Bowing to the pressure of Moroccan nationalists, he ordered the commencement of the Green March on November 6, 1975.<sup>73</sup> In response to this action, the Security Council adopted Resolution 380(1975) on the same day.<sup>74</sup> It deplored the March and called

66. N.Y. Times, Oct. 17, 1975, § 1, at 1, col. 4.

67. 30 U.N. SCOR, Supp. (Oct.-Dec. 1975) 17, U.N. Doc. S/11852 (1975).

68. 30 U.N. SCOR, Supp. (Oct.-Dec. 1975) 17, U.N. Doc. S/11851 (1975).

69. 30 U.N. SCOR, Resolutions and Decisions 8, U.N. Doc. S/Res/377 (1975).

70. 30 U.N. SCOR, Supp. (Oct.-Dec. 1975) 27, 28, U.N. Doc. S/11863 (1975).

71. 30 U.N. SCOR, Resolutions and Decisions 9, U.N. Doc. S/Res/379 (1975).

72. 30 U.N. SCOR, Supp. (Oct.-Dec. 1975) 33, U.N. Doc. S/11874 (1975).

73. The Green March brought denunciations of Morocco's actions in subsequent meetings of the Fourth Committee. *See, e.g.*, 30 U.N. GAOR, C.4 (2173d-2182d mtgs.), U.N. Docs. A/C.4/30/SR.2173-2182 (1975).

74. 30 U.N. SCOR, Resolutions and Decisions 9, U.N. Doc. S/Res/380 (1975).

upon Morocco to withdraw all of the participants from Western Sahara. That same day, Morocco informed Spain that the March into Western Sahara would continue unless Madrid agreed to bilateral negotiations concerning a transfer of sovereignty over Western Sahara from Spain to Morocco.<sup>75</sup>

Consequently, Madrid entered into negotiations with Morocco and Mauritania. On November 14, 1975, Spain agreed to terminate its presence in Western Sahara by February 28, 1976. By then, the powers and responsibilities of administering the Territory would have been transferred to a "temporary" administration controlled by Morocco and Mauritania.<sup>76</sup> Pursuant to the Madrid Agreement, Western Sahara was partitioned: Morocco annexed the northern two-thirds of the Territory and granted control of the southern third to Mauritania.<sup>77</sup>

In response to this unfortunate but foreseeable chain of events, the General Assembly, on December 10, 1975, adopted Resolution 3458(XXX).<sup>78</sup> The Resolution, which was divided into two parts, is the General Assembly's most perplexing statement on Western Sahara. Part A reaffirmed the inalienable right of the people of Western Sahara to self-determination within a framework that guaranteed and permitted them the free and genuine expression of their will, and requested Spain to "take immediately all necessary measures, in consultation with all the parties concerned and interested, so that all Saharans originating in the Territory may exercise fully and freely under United Nations supervision their inalienable right to self-determination."<sup>79</sup> Part B took note of the Madrid Agreement, reaffirmed the inalienable right of the Saharan people to self-determination and requested the "interim administration to take all necessary steps to ensure that all the Saharan population originating in the Territory will be able to exercise their inalienable right to self-determination through free consultations organized with the assistance of a representative of the United Nations appointed by the Secretary-General."<sup>80</sup>

75. 30 U.N. SCOR, Supp. (Oct.-Dec. 1975) 31, U.N. Doc. S/11871 (1975). *But see* response at 30 U.N. SCOR, Supp. (Oct.-Dec. 1975) 32, U.N. Doc. S/11873 (1975).

76. 30 U.N. SCOR, Supp. (Oct.-Dec. 1975) 41, U.N. Doc. S/11880, Annex III (1975). The contents of the Madrid Agreement have never been disclosed. It is, however, believed that in exchange for transferring "sovereignty" over Western Sahara to Morocco and Mauritania, Spain received a substantial percentage interest in the phosphate mines at Bu Craa.

77. Morocco and Mauritania officially delimited the frontier in Western Sahara on April 14, 1976. *See* Letter dated May 17, 1976, from the Permanent Representative of Algeria to the United Nations addressed to the Secretary-General, 31 U.N. SCOR, Supp. (Apr.-June 1976) 25, U.N. Doc. A/31/91-S/12076 (1976).

78. G.A. Res. 3458, 30 U.N. GAOR, Supp. (No. 34) 116-17, U.N. Doc. A/10034 (1975).

79. *Id.* Part A, para. 7.

80. *Id.* Part B, para. 4.

The schizophrenic character of this Resolution reflected the General Assembly's confusion about the decolonization of Western Sahara. In Part A, the General Assembly paid lip service to its previous commitment to self-determination for colonial peoples, while in Part B it explicitly recognized the so-called *fait accompli* of the parties to the Madrid Agreement, an invalid transfer of title under accepted standards of international law and U.N. practice.<sup>81</sup>

In addition, Resolution 3458(XXX) failed to refer to the referendum that had been the impetus for eight previous resolutions on Western Sahara. In its place was the language of "free consultations," reminiscent of an "act of free choice" held in West Irian during 1969 that the General Assembly accepted as a valid expression of the will of the colonial people concerned.<sup>82</sup>

#### D. *The Founding of the Saharui Arab Democratic Republic*

In a dramatic early morning ceremony in the Sahara on February 28, 1976, the Frente POLISARIO declared the establishment of the Saharui Arab Democratic Republic, the same day as the "effective" transfer date of the Madrid Agreement.<sup>83</sup> This event was the culmina-

81. The right of colonial peoples to self-determination is a principle, *jus cogens*, of international law. Article 53 of the Vienna Convention on the Law of Treaties specifically invalidates any agreement concluded in violation of a *jus cogens* rule. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, Art. 53, U.N. Doc. A/CONF.39/27 (1969). The *jus cogens* nature of the right to self-determination has been disputed by at least one author who asserts that the right of self-determination may be protected by the *pacta tertiis* rule. See J. CRAWFORD, *supra* note 17, at 79-81, 366.

The Madrid Agreement was an invalid exercise of power by Spain under accepted U.N. practice. According to the past application of Chapter XI of the Charter, Spain may transfer its administrative responsibilities for Western Sahara only to the people of the Territory or to the U.N. The territorial claims of Morocco and Mauritania confer no right to exercise authority over the Territory unless the General Assembly recognizes the validity of those claims and their superiority to the right of the colonial people to self-determination. Spain could have entered a legitimate agreement to dispose of the Territory only if it had exercised sovereignty over Western Sahara. It is, however, often said that Administering States are, *ipso facto*, not sovereign with respect to their Chapter XI territories. A. RIGO-SUREDA, *supra* note 17, at 33; Res. 2625 (XXV), *supra* note 42. To the extent that sovereignty implies the unfettered right to control, or dispose of, the territory in question, the obligations of Article 73b of the Charter and the principle of self-determination substantially limit the sovereignty of an Administering State. See Advisory Opinion on Western Sahara, [1975] I.C.J. 12, 145 (separate opinion of Judge de Castro).

82. G.A. Res. 2504, 24 U.N. GAOR, Supp. (No. 30) 3, U.N. Doc. A/7630 (1969). With the adoption of this resolution, the General Assembly took note of an "act of free choice" in the Territory, conducted while an occupying State, which had asserted a claim to the Territory, exercised tight political control over the indigenous population.

83. The relevant documents and memoranda relating to the founding of the SADR can be found in T. HULTMAN, *Democratic Arab Republic of the Sahara*, in 5 CONSTITUTIONS OF DEPENDENCIES AND SPECIAL SOVEREIGNTIES (1978). The documents include: The Constitution of the Provisional National Saharan Council, Proclamation of the Democratic Arab

tion, or nearly so, of the efforts of the Frente POLISARIO, an organization dedicated to the creation of an independent Saharan State in the former Territory of Western Sahara.<sup>84</sup>

The SADR is an Islamic Republic. Islam is the State's religion and its source of law. Arabic is the official national language.<sup>85</sup> The boundaries of the SADR are the Saguia El Hamra and the Rio de Oro.<sup>86</sup> The governmental functions of the SADR are vested in three branches: an Executive Council, a Legislative Body, and a Judicial System. The supreme organ of executive power is the Revolutionary Command Council, presided over by the Secretary-General of the Frente POLISARIO, which has the power to appoint a Council of Ministers.<sup>87</sup> Legislative and consultative power are vested in a 41-member Saharan National Council.<sup>88</sup> Judicial power is vested in a Judiciary Council consisting of the Presidents of the Tribunals and presided over by the Minister of Justice.<sup>89</sup> The tribunal system consists of primary tribunals, a court of appeals, a Supreme Court of the People, and the State Security Court.<sup>90</sup> Chapter V of the SADR Constitution provides that the Executive Committee of the Frente POLISARIO will fulfill the duties of the Revolutionary Command Council until the first general popular congress is held after the recovery of national sovereignty.<sup>91</sup>

### E. *International Developments*

In the midst of the war of national liberation, the Council of Ministers of the Organization of African Unity, on July 15, 1976, reaffirmed the inalienable right of the Saharwi people to self-determination and independence and called for a solution to the crisis that would be acceptable to all interested and concerned parties, including the Saharwi people, within the context of African unity.<sup>92</sup> The Fourth Committee

Republic of the Sahara, a Frente POLISARIO Memorandum, and the Constitution of the Democratic Arab Republic of the Sahara.

84. See Report of the Visiting Mission to Spanish Sahara, *supra* note 3, at 62. There is a distinction between "declaring" a State and "establishing" a State. A State may be "declared" but be prevented from being "established" because of external factors. In this regard, the declaration of the SADR was not wholly effective because of the Moroccan occupation.

85. SADR CONST. art. 3.

86. *Id.* art. 1.

87. *Id.* arts. 12-14.

88. *Id.* art. 21.

89. *Id.* art. 24.

90. *Id.* arts. 28, 29.

91. *Id.* art. 31.

92. Resolution Adopted at the Thirteenth Ordinary Session of the Assembly of Heads of



of the General Assembly in November, 1976 drafted a resolution that recalled Resolution 3412(XXX) regarding cooperation between the U.N. and O.A.U. and postponed consideration of Western Sahara until the Thirty-Second Session of the General Assembly.<sup>93</sup>

The year 1977 brought no movement in the positions of the parties to the Saharan conflict. Then, in July, 1978, the 15th Ordinary Session of the Assembly of Heads of State and Government of the O.A.U. adopted a resolution establishing an *ad hoc* committee of at least five heads of State—members of O.A.U.—to study “all the data” in the Western Sahara dispute, including the exercise of the peoples’ right to self-determination, in preparation for an extraordinary summit to discuss the issue.<sup>94</sup> In October, 1978, reports indicated that Morocco and Mauritania had accepted the mediation of the *Ad hoc* Committee in an effort to solve the problem of Western Sahara.<sup>95</sup>

The *Ad hoc* Committee began its work on November 30, 1978, at Khartoum.<sup>96</sup> On December 2, 1978, the *Ad hoc* Committee announced the formation of a subcommittee with a mandate to visit the region, contact all the parties concerned, including “the Saharan people,” and to undertake necessary measures for restoring peace and security.<sup>97</sup> The Committee appealed to all parties to adhere to an immediate cease-fire in order to enable the subcommittee to accomplish its duties.<sup>98</sup>

In December, 1978, the General Assembly reconsidered Western Sahara and adopted a resolution that noted the efforts of the O.A.U. and resurrected the language of Resolutions 2983(XXVII) and 3162(XXVIII) to the effect that it recognized the inalienable right of the Saharwi people to self-determination and independence.<sup>99</sup>

On April 30, 1979, the O.A.U. subcommittee visited Algeria, Morocco, and Mauritania and met with representatives of the Frente

State and Government of the Organization of African Unity, O.A.U. Doc. AHG/Res. 81 (XIII), *reprinted in* U.N. Doc. A/31/136, Annex II (1976).

93. G.A. Res. 3412, 30 U.N. GAOR, Supp. (No. 34) 5, U.N. Doc. A/L.767/Rev.2 (1975). Fourth Committee decision in U.N. Doc. A/31/136 (1976).

94. Resolution Adopted at the Fifteenth Ordinary Session of the Assembly of Heads of State and Government of the Organization of African Unity, O.A.U. Doc. AHG/Res. 92 (XV), *reprinted in* U.N. Doc. A/33/235, Annex II (1978).

95. 1979 Report of the Special Committee on Decolonization, *supra* note 7, at 106.

96. Letter from the Permanent Representative of the Sudan to the United Nations addressed to the Secretary-General, U.N. Doc. A/33/364 (1978).

97. 1979 Report of the Special Committee on Decolonization, *supra* note 7, at 107.

98. *Id.*

99. G.A. Res. 3162, 28 U.N. GAOR, 1 Supp. (No. 30) 110, U.N. Doc. A/9030 (1973); G.A. Res. 33/31, 33 U.N. GAOR, Supp. (No. 45) 172, U.N. Doc. A/33/45 (1978).

POLISARIO in Algiers.<sup>100</sup> On June 26, 1979, the *Ad hoc* Committee issued a communique stating that it had adopted certain recommendations of the subcommittee concerning the exercise of the right to self-determination by the people of Western Sahara and the modalities of its exercise.<sup>101</sup> The recommendations, submitted to the O.A.U. Assembly at its 16th Ordinary Session in July, 1979 were adopted in a decision wherein the Assembly:

- 1) called for a general and immediate cease-fire;
- 2) decided that the Saharan people would exercise their right to self-determination in a general and free referendum that would enable them to choose either total independence or maintenance of the status quo;
- 3) decided to convene a meeting of all parties concerned, including the representative of Western Sahara, to request their cooperation for the implementation of the decision; and
- 4) established a special committee of six member States of OAU to work out the modalities and to supervise the organization of [a] referendum with the cooperation of the UN on the basis of universal suffrage.<sup>102</sup>

Less than one month later, the government of Mauritania concluded a peace agreement with the Frente POLISARIO in which Mauritania pledged to cease hostilities against the Frente POLISARIO and withdraw from the territory it had occupied.<sup>103</sup>

In response to these events, the General Assembly adopted a resolution on Western Sahara on November 21, 1979.<sup>104</sup> It repeated the text of the previous resolution and, for the first time in any General Assembly resolution on Western Sahara, officially recognized the Frente POLISARIO as the legitimate representative of the Saharan people.<sup>105</sup> This recognition by the General Assembly gave the Frente POLISARIO standing to participate fully in any search for a just and lasting *political* solution to the dispute.<sup>106</sup> Recognition of the Frente POLISARIO as the legitimate representative of the Saharwi people was tantamount to recognition of the primacy of this people's interest in the decolonization of Western Sahara.

100. 1979 Report of the Special Committee on Decolonization, *supra* note 7, at 107.

101. *Id.*

102. Decision Adopted at the Sixteenth Ordinary Session of the Assembly of Heads of State and Government of the Organization of African Unity, O.A.U. Doc. AHG/Dec. 114 (XVI), *reprinted in* U.N. Doc. A/34/483 (1979).

103. Text of Peace Agreement, *reprinted in* Special Committee on Decolonization, 34 U.N. GAOR (1161st mtg.) 61, U.N. Doc. A/AC.109/P.V.1161 (1979).

104. G.A. Res. 34/37, 34 U.N. GAOR, Supp. (No. 46) 203, U.N. Doc. A/34/46 (1979).

105. *Id.* para. 7.

106. *Id.*

## II. Recognition Theory

A comprehensive theory of recognition must be related to the fundamental goals of contemporary international law. Hence, decisions about recognition should select those elements of past decisions which will contribute to minimum order and conditions of human dignity in the future and reject those elements which never have contributed, or will no longer contribute to the minimum and optimum goals of the world community.<sup>107</sup> In the case of Western Sahara, recognition of the SADR government-in-exile would, in accordance with a constitutive view of recognition, serve to sanction Morocco's non-conformity to a peremptory international norm, the right of colonial peoples to self-determination, and affirmatively hasten the complete decolonization of the Territory.<sup>108</sup>

Recognition as a theory in the practice of international law is either a political act or a legal one, depending on the school of thought to which the recognizing institution adheres.<sup>109</sup> Historically, learned jurists have propounded two theories, or rather made two extreme assertions as to the correct view of recognition: (1) the declaratory theory and (2) the constitutive theory.

The declaratory theory holds that recognition is a declaration of existing fact. The factual criteria are, primarily, those delineated in the Montevideo Convention on the Rights and Duties of States:<sup>110</sup> a permanent population, a defined territory, a government, and capacity to

107. Reisman & Suzuki, *Recognition and Social Change in International Law*, in *TOWARD WORLD ORDER AND HUMAN DIGNITY* 415 (W. REISMAN & B. WESTON eds. 1976).

108. Some jurists have asserted that recognition of governments is distinct from recognition of States. J. CRAWFORD, *supra* note 17, at 27-29. With respect to recognition of governments, it is not the existence of any particular facts that is important, but rather the single fact of the new government's effective control and authority, with a reasonable prospect of permanency, over the whole, or nearly the whole, territory of the State. H. LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 98 (1947). These arguments have some force with respect to existing States. But, where nascent States are concerned, no separate recognition is accorded to their government. In fact, the recognition of a new State is often accomplished by recognition of its government. T. CHEN, *THE INTERNATIONAL LAW OF RECOGNITION* 101 (1951). Thus, recognition of the SADR government-in-exile as a new government is at once recognition of the SADR as a new State.

109. The recognition of a new State, or of a new government of an existing State, is a unilateral act which the recognizing government can grant or withhold. . . . While States may regard it as desirable to follow certain legal principles in according or withholding recognition, the practice of States shows that the act of recognition is still regarded as essentially a political decision which each State decides in accordance with its own free appreciation of the situation.

Memorandum of the Legal Aspects of the Problem of Representation in the United Nations, 5 U.N. SCOR, Supp. (Jan.-May, 1950) 19, U.N. Doc. S/1466 (1950).

110. Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, T.S. No. 881. Lauterpacht thinks that the most important "fact" is not delineated in the Montevideo Convention. Rather, he stresses the existence of an independent State, i.e., a

enter into relations with other States. Thus, whenever the factual requirements exist, the granting of recognition is said to be a matter of legal duty.<sup>111</sup>

The constitutive theory is stated as follows: "A State is, and becomes an International Person through recognition only and exclusively."<sup>112</sup> That is, although a State may exist in fact, it does not exist in law until recognized. Those institutions that adhere to this theory consider the practice of recognition a means by which States can sanction non-conformity to international norms.<sup>113</sup>

#### A. *Premature Recognition*

It can be argued that, due to the existence of armed conflict between the Frente POLISARIO and Morocco, recognition of the SADR government-in-exile would be premature.<sup>114</sup> However, a careful examination of the doctrine of premature recognition reveals that it derives from the notion of respect for the sovereignty of a parent State.<sup>115</sup> Premature recognition is said to amount to a denial of the lawful sovereignty of a parent State actively engaged in asserting its authority against insurgents in a civil conflict within its own territory. Premature recognition is, therefore, an unlawful intervention in the domestic jurisdiction of a State.<sup>116</sup>

State with a government independent of any other State. H. LAUTERPACHT, *supra* note 108, at 45.

111. H. LAUTERPACHT, *supra* note 108, at 6. The declaratory theory claims to negate the potential abuses of recognition as a political act by imposing upon the new State international rights and obligations at the moment of birth, and imposing upon third States obligations owed to the new State. Yet, because fulfillment of the criteria is necessarily a factual inquiry, political considerations may attach to the determination of the facts. *Id.* at 45. Thus, there may arise situations where, even though a State has objectively fulfilled those criteria, political reasons dictate withholding recognition, and vice versa. Compare the U.S. observations regarding the qualifications for statehood with respect to the admission of Israel to the U.N., 3 U.N. SCOR (383d mtg.) 10-11 (1948), with the U.S. policy regarding recognition of Guinea-Bissau, Rouire, *Contemporary Practice of the United States Relating to International Law*, 68 AM. J. INT'L L. 309 (1974).

112. L. OPPENHEIM, *INTERNATIONAL LAW* 121 (7th ed. 1948).

113. It has been argued that acceptance of the constitutive theory causes a condition in which the unrecognized State is neither protected by international law in certain essential respects nor bound to respect the equally vital legal interests of States already established. H. LAUTERPACHT, *supra* note 108, at 52.

114. Premature recognition may be defined as recognition conferred in spite of the absence of the facts necessary for its grant. S. PATEL, *RECOGNITION IN THE LAW OF NATIONS* 57 (1959). The term includes recognition granted *durante bello*, when the outcome of the struggle is yet uncertain. H. LAUTERPACHT, *supra* note 108, at 8. Recognition is not premature when the entity seeking recognition enjoys a tangible measure of success accompanied by a reasonable prospect of permanency. *Id.* at 12.

115. H. LAUTERPACHT, *supra* note 108, at 8.

116. S. PATEL, *supra* note 114, at 60.

In the context of Western Sahara, this argument is without force. The Frente POLISARIO is not engaged in armed conflict with Spain, the former metropolitan State.<sup>117</sup> It is engaged in armed conflict with Morocco, a State that legitimately can claim no relationship with Western Sahara other than contiguity. Thus, recognition of the SADR government-in-exile would not deny to a parent State its lawful sovereignty over personal territory because no parent State is involved, nor exists.<sup>118</sup>

The doctrine of premature recognition, however, need not be narrowly applied. It is equally valid and generally applicable to any situation in which a political community asserts a claim to recognition. According to this view, the doctrine has some bearing on the separate question of the right of a political community to claim recognition by third States and to the duty of third States to grant recognition.<sup>119</sup> Premature recognition in this instance is said to be an abuse of the power of recognition in respect of a community which does not exist factually or independently yet seeks to be given a status that it does not possess.<sup>120</sup> Unless the political community seeking recognition can boast of a reasonably certain and permanent existence and has achieved political solidarity, this view holds that it is both imprudent and illegal to grant recognition.<sup>121</sup>

An objective appraisal of the political climate in Western Sahara reveals that the SADR government-in-exile has satisfied at least one of the conditions necessary to characterize a grant of recognition to a nascent political community as legal. The Frente POLISARIO has achieved a high degree of political solidarity both within and without Western Sahara.<sup>122</sup> Regarding the remaining condition, "a reasonably certain and permanent existence," the inherently amorphous nature of this standard makes it susceptible to as many different interpretations as there are States in the world—interpretations which have been and will continue to be heavily influenced by political considerations. Moreover, the permanent existence of the SADR depends on myriad political decisions that will be made by third States. It cannot, therefore, fairly be said that the "reasonably certain and permanent exist-

117. Spain officially terminated its presence in Western Sahara on February 28, 1976, pursuant to the terms of the Madrid Agreement. 31 U.N. SCOR, Supp. (Jan.-Mar. 1976) 107, U.N. Doc. S/11997 (1976). See note 76 *supra*.

118. See note 81 *supra*.

119. H. LAUTERPACHT, *supra* note 108, at 11.

120. S. PATEL, *supra* note 114, at 60.

121. *Id.* at 61.

122. See text accompanying notes 230-38 *infra*.

ence" standard stands as a bar to any grant of recognition to the SADR government-in-exile. If a State determines, for reasons political or otherwise, that there exists a reasonable certainty that the SADR will survive the Moroccan occupation, and proceeds to recognize the SADR government-in-exile, such a grant of recognition is clearly legitimate.

### B. *Recognition of Belligerency and Insurgency*

Recognition of the SADR government-in-exile must also be distinguished from recognition of belligerency and insurgency.<sup>123</sup> Both forms of recognition presuppose an incumbent government and an insurgent group, and are only applicable where the insurgent group attempts to acquire control over all or part of the territory of the incumbent government.<sup>124</sup> The armed conflict in such a situation is within the domestic jurisdiction of the incumbent government. Accordingly, the development of the law of recognition of belligerency has attempted to accommodate to the sovereign interests of the incumbent government, particularly those interests that relate to the legality of foreign assistance to the insurgent group.<sup>125</sup> Community response to

123. Insurgency has been defined as the state of political revolt or insurrection in a State that falls short of civil war, S. PATEL, *supra* note 114, at 92, or more recently as a twilight zone between rebellion and belligerency, Farer, *Foreign Intervention in Civil Armed Conflict*, 142 RECUEIL DES COURS 318 (1974). Some jurists regard any distinction between the recognition of insurgency and belligerency as fictitious. Lauterpacht states:

International law knows of no 'recognition of insurgency' as an act conferring upon insurgents international rights following from a well-defined status. That insurgency has been recognized in any given case means that specific rights have been created. . . .

It does not create a status from which further and more general rights may be deduced.

H. LAUTERPACHT, *supra* note 108, at 270-71. See also I D. O'CONNELL, *INTERNATIONAL LAW* 164-65 (1965). Belligerency describes a situation in which rebellion within a State achieves such dimension and intensity that its repercussions or effects are felt beyond the frontiers of the State in question and directly affect other States. When this point is reached, the matter ceases to be one of domestic concern and may become one that international law takes cognizance of and seeks to regulate. S. PATEL, *supra* note 114, at 87. Certain factual conditions must exist in order to permit a foreign State's recognition of belligerents: a) there must exist within the State an armed conflict of a general (as distinguished from a purely local) character; b) the insurgents must occupy and administer a substantial portion of national territory; c) the insurgents must conduct hostilities in accordance with the rules of war and through organized armed forces acting under a responsible authority; and d) there must exist circumstances which make it necessary for outside States to define their attitude by means of recognition of the belligerency. H. LAUTERPACHT, *supra* note 108, at 176.

124. 'Incumbent government' designates a government which has already exercised sovereignty over the State's territory and which continues to exercise it over at least a part of the territory. Some cases may arise where no government meets these criteria. In such cases, the 'vacuum' will be filled by a hasty recognition of one faction as 'incumbent.'

Krauss, *Internal Conflicts and Foreign States: In Search of the State of the Law*, 5 YALE STUD. WORLD PUB. ORD. 173, 178 n.19 (1979).

125. For a more complete discussion of the law of belligerency, see *id.*

the cases of the Republic of Biafra and the Provisional Government of Algeria, although not directly analogous to the case of the SADR government-in-exile, illustrate the application of this doctrine in a non-colonial and colonial context, respectively.<sup>126</sup>

In the context of Western Sahara, legal rules regarding recognition of belligerency and insurgency do not apply. The Frente POLISARIO is not an insurgent group seeking to acquire control over the territory of an incumbent government because no incumbent government of Western Sahara can be said to exist.<sup>127</sup> Moreover, decolonization issues arising under Chapter XI of the U.N. Charter are not within the domestic jurisdiction of any State.<sup>128</sup> By its very nature, the conflict in Western Sahara is of international cognizance; labels of belligerency or insurgency are inappropriate.

### C. *Recognition of Governments-in-Exile*

Recognition of a government-in-exile logically presupposes the existence of a State from which the government claiming recognition was forced to flee.<sup>129</sup> In this regard, it can be argued that, because the SADR was not a State prior to the Moroccan occupation, the SADR government-in-exile may not now claim to be the legitimate government of the SADR. But, in the context of decolonization, otherwise valid rules of law based on conventional wisdom must yield to the special circumstances of colonial rule. A Non-Self-Governing Territory

126. During the Nigerian Civil War, five Third World States recognized the Republic of Biafra. No State formally accorded the Biafran insurgents the status of belligerents. Motivated by considerations of sovereignty, the O.A.U. favored Nigeria's claims to preservation of national unity and territorial integrity against the Biafran claim to self-determination. See Ijalaye, *Was 'Biafra' at Any Time a State in International Law?*, 65 AM. J. INT'L L. 551 (1971). After having been recognized by various States, the Provisional Government of Algeria claimed that French acquiescence in many of its actions amounted to recognition of belligerent status. The Provisional Government argued that this recognition of belligerent status and the denunciation of the Atlantic Pact constituted legal grounds sufficient to compel the cessation of unlawful intervention by the Atlantic Powers in support of France in the Franco-Algerian conflict. M. BEDJAOUI, *LAW AND THE ALGERIAN REVOLUTION* 142-80 (1961).

127. If one must choose an "incumbent government," from among the parties to the Saharan conflict, the Frente POLISARIO is logical; the equities clearly favor it. In the past, liberation movements have become "incumbent" governments. Krauss, *supra* note 124, at 221 n.174.

128. R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE U.N.* 103 (1963).

129. Marek considers governments-in-exile as the surviving organs of the regularly constituted surviving legal order of the relevant States. She would affirm the organic character of the government only where it had been properly constituted in its own country and had simply transferred its activities abroad, with no break in its legal or actual continuity, following the total occupation of its territory. K. MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* 97 (1968).

under Chapter XI of the U.N. Charter is by definition one in which the people "have not yet attained a full measure of self-government."<sup>130</sup> The requirement of a prior-existing State from which the properly constituted government claiming recognition fled may not be applied to Western Sahara. To accept the fact of the objective "non-existence" of the SADR as a valid basis for refusing to recognize the SADR government-in-exile as the legal sovereign in the former Territory of Western Sahara would accord legal consequences to Morocco's illegal occupation.<sup>131</sup>

Recognition of governments-in-exile has occurred in the past. Though the conditioning factors that necessitated and justified recognition of those governments are not fully duplicated here, the theoretical framework for the recognition suggests a proper response to the Frente POLISARIO's claim to recognition for the SADR government-in-exile. The SADR government-in-exile is a government *sui generis*, and analysis of past practice regarding recognition of governments-in-exile can be instructive but not authoritative.

During both World Wars, recognition was accorded to governments-in-exile dispossessed of their territory. Such recognition was defended primarily on the theory that belligerent occupation does not extinguish the identity and continuity of a State and its organs.<sup>132</sup>

During World War I, governments of some States that had been overrun by Germany physically existed on foreign soil. The Belgian government operated at Le Havre, France during the entire period of German occupation.<sup>133</sup> Similarly, the exiled Serbian government, accompanied by the diplomatic corps, established itself in Corfu, and continued its military and political activities fully recognized and sup-

130. U.N. CHARTER art. 73.

131. "It is not the existence and recurrence of illegal acts that present any danger to international law, but rather the absence of sanction particularly as expressed in the law-creating capacity of such acts . . . [and] the possibility of their giving rise to legal titles on equal footing with lawful acts." K. MAREK, *supra* note 129, at 554. Lauterpacht agreed: "illegal acts cannot produce legal results beneficial to the wrongdoer." H. LAUTERPACHT, *supra* note 108, at 413.

132. Marek argues that "recognition," is not the proper terminology to describe the treatment of exiled governments: "[t]he exiled governments in London during World War II were not new subjects of international law and hence the question of recognition per se was not raised. Indeed, a grant of recognition was quite unnecessary on the assumption that the occupied States and their organs abroad retain their identity . . . ." K. MAREK, *supra* note 129, at 91. "Thus what is termed 'recognition' is in reality affirming their continuity in the face of proclamations of their extinction by the occupying power." *Id.* at 438.

133. The diplomatic corps followed the government to Saint-Adresse. The impossibility of convening the Belgian Parliament was met by Royal Decree. The Belgian army was maintained in the field and Belgian colonies were administered by the government-in-exile. *Id.* at 86.



ported by the Allies.<sup>134</sup> And the Czechoslovak National Council was recognized as the *de facto* belligerent government endowed with proper authority to direct the military and political affairs of the Czechs, although the territory of the new State was under the control of Austria-Hungary.<sup>135</sup>

The governments of eight European countries operated in exile in London during World War II.<sup>136</sup> Their territories had been overrun by Nazi Germany, a belligerent occupation *sensu strictu*, i.e., occupation effected during actual hostilities on the strength of military seizure of territory and not on a conventional basis.<sup>137</sup> Relevant articles of the Hague Convention of 1907,<sup>138</sup> as interpreted, indicate that a State's identity and continuity are not affected by belligerent occupation of its territory, that territorial changes undertaken by the occupant are invalid, that the nationality of the population is unaffected, that local authorities established in the occupied territory by the occupant State do not enjoy sovereignty, and that the occupation itself is only provisional and temporary. In other words, the belligerent occupant can only interfere with the practical working of the legal order of the occupied State; but whether that legal order is able to develop and operate, or whether it is technically prevented from doing so, it continues to be valid and to exist.<sup>139</sup>

134. *Id.* at 87, 237-62.

135. 1 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 203-08 (1940).

136. The eight exiled governments were those of Belgium, Czechoslovakia, Greece, Luxembourg, The Netherlands, Norway, Poland, and Yugoslavia. *See generally* Oppenheimer, *Governments and Authorities in Exile*, 36 AM. J. INT'L L. 568 (1942); Brown, *Sovereignty in Exile*, 35 AM. J. INT'L L. 666 (1941).

137. K. MAREK, *supra* note 129, at 75.

138. Hague Convention of 1907, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539. Articles 42 and 43 are relevant:

Art. 42. Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

Art. 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore and ensure as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

*See also* K. MAREK, *supra* note 129, at 75-79.

139. K. MAREK, *supra* note 129, at 80. A distinction must be made here between belligerent occupation and *de facto* government. A *de facto* government is a consequence of internal disturbances or civil wars, whereas belligerent occupation results from international conflict. A *de facto* government can claim international recognition when it has firmly established itself, while belligerent occupation is provisional by nature. Finally, a *de facto* government tends to substitute a new government for that of its political adversaries; belligerent occupation, on the other hand, leaves the sovereignty of the occupied State intact. To mistake belligerent occupation for a *de facto* government would mean treating the occupied State as annexed, its continuity as interrupted, its identity as lost, and its personality as merged into the occupant's. *Id.* at 82-83.

These governments exercised all of the rights of sovereignty that they had exercised in their respective territories prior to the occupation and nine sovereign governments thus operated from the same territorial base.<sup>140</sup> They enacted legislation,<sup>141</sup> entered into treaty relations between themselves and third States,<sup>142</sup> established maritime courts,<sup>143</sup> maintained armed forces,<sup>144</sup> enjoyed diplomatic privileges and immunities,<sup>145</sup> and administered colonial possessions.<sup>146</sup> Insofar as enforcement of their legislative decrees was concerned, the exiled governments had to look to the courts and authorities of the territorial sovereign for support and cooperation in giving them effect.<sup>147</sup>

Community response to the belligerent occupation of Europe by Nazi Germany, and in particular the decision to recognize the exiled governments in London, are examples of creative State exploitation of international norms when confronted with clearly illegal situations. Specifically, the peremptory principles of the continuity of occupied States and the continuity of the organic character of their respective governments properly constituted, relegated to the background the otherwise critical factor in a recognition decision—effectiveness of a government within a territory.<sup>148</sup> In addition, these overriding principles easily cured any minor flaws in the internal legality of an exiled

140. Such a state of affairs violates no norm of customary international law so long as the governments-in-exile have the consent of the territorial State. "A state cannot exercise rights of sovereignty in the territory of another state without the latter's consent." Oppenheimer, *supra* note 136, at 594. Here, the eight governments-in-exile had acquired the consent of the British government.

141. For a more complete discussion of the legislative activity of the exiled governments, see *id.* at 584-86.

The mere fact that a foreign Government has been deprived of the control of a part or the whole of its territory by an enemy in no way invalidates legislation passed, or other acts of sovereignty done, by it outside its normal territory, provided that its constitutional law contains no insuperable obstacle to the validity of such legislation or other sovereign acts and provided that [His Majesty] continues to recognize it as the *de jure* Government and recognizes no other Government as the *de facto* sovereign.

A. McNAIR, *THE LEGAL EFFECTS OF WAR* 357 (3d ed. 1948).

Where the constitution of a State is silent with respect to the power to enact legislation and issue decrees on foreign soil, it should be interpreted to protect the vital interests of the State and its people. Oppenheimer, *supra* note 136, at 582.

142. For a more complete discussion of the treaty-making power of the exiled governments, see Oppenheimer, *supra* note 136, at 577-78.

143. Allied Powers (Maritime Courts) Act, 1941, 4 & 5 Geo. 6, c. 21.

144. Allied Forces Act, 1940, 3 & 4 Geo. 6, c. 51.

145. Diplomatic Privileges (Extension) Act, 1941, 4 & 5 Geo. 6, c. 7. For a more complete discussion of the diplomatic activities of the exiled governments, see Oppenheimer, *supra* note 136, at 576-77.

146. Brown, *supra* note 136, at 667.

147. Oppenheimer, *supra* note 136, at 587.

148. For a more complete discussion of the effectiveness requirement, see H. LAUTERPACHT, *supra* note 108, at 98-102; I D. O'CONNELL, *supra* note 123, at 148-49.

government properly constituted prior to the transfer of its activities abroad.<sup>149</sup> The legal title of such governments was ultimately based on the fact that they left their respective countries as regular, legitimate State organs.<sup>150</sup>

Where an exiled government had never exercised any rights of sovereignty within the territorial boundaries of the occupied State and was in fact created on foreign soil, it could only claim a revolutionary basis for its existence. The requirement of effectiveness was not irrelevant here; by definition, such a government failed to satisfy the requirement.<sup>151</sup> Consequently, these governments were accorded a provisional recognition pending the confirmation of their claim on their return to their home countries.<sup>152</sup>

Thus, the method of recognizing the exiled government and the significance of the requirement of effectiveness were made dependent on whether the exiled government in question was properly constituted prior to the belligerent occupation of its territory and the subsequent transfer of its activities abroad. Where the government in question was properly constituted prior to the transfer of its activities abroad, effectiveness of the exiled government within its territory was wholly irrelevant. In the case of a government constituted on foreign soil, the effectiveness of the exiled government within its territory strengthened its claim to recognition and was an important factor in determining the propriety of a grant of recognition.<sup>153</sup> Moreover, regarding the matter of legal continuity, the uninterrupted legal continuity of an exiled government was not indispensable to the international continuity of its State. It was, however, indispensable to the continuity of the organic character of the government within the context of the previously existing constitutional system.<sup>154</sup>

The experience of the exiled governments during the World Wars represents a tangible illustration of the dynamic aspect of the principle of the continuity of occupied States and its corollary principle of the

149. Such was the case with the Dutch and Belgian governments-in-exile. See K. MAREK, *supra* note 129, at 97-98.

150. *Id.* at 97.

151. "[I]n certain circumstances, a limited degree of effectiveness may be achieved by a revolutionary government in exile. It may consist in its ability to rally around itself all, or the great majority of, its nationals abroad, to organize armed forces and other State organs," or in any other connection between the exiled government and the occupied territory. K. MAREK, *supra* note 129, at 314.

152. Such was the nature of the recognition granted to the French National Committee and the Czech government. *Id.* at 99, 311-24.

153. *Id.* at 313-14.

154. *Id.* at 98.

continuity of the organic character of exiled State governments. One ought to restrict a rigid application of the legal rules that emanate from these principles to those cases in which a sovereign, independent State existed prior to the belligerent occupation. Such a restriction is justified considering that the theory from which these principles derive assumes an unbroken, organic link between the exiled governments and the States they represented.<sup>155</sup> Thus, in the context of decolonization and self-determination, the otherwise critical requirement of a government's effectiveness within its territory as a precondition to recognition must yield to the peremptory principle of the right of colonial peoples to self-determination.<sup>156</sup> Where the colonial people in question were, by belligerent occupation of their territory by a foreign State, prevented from exercising their right to self-determination, this result is particularly desirable. In accordance with the teachings of both World Wars, a creative community response to the current situation in Western Sahara would not permit the lack of effectiveness of the SADR government-in-exile to defeat that government's claim to recognition.<sup>157</sup> The right of a colonial people to self-determination, particularly where they have attempted a partial exercise of their right by forming a State and constituting a government, cannot be permitted to be defeated by a rigid interpretation and application of otherwise valid principles of international law.

Yet how long can it be said that the legal identity of a State and its exiled government are preserved, despite the lack of effective control, in a situation of effective but illegal annexation? For Marek, the final loss of independence, either by way of a legal settlement or by way of a total obliteration of the entire delimitation of a State, signifies its extinction.<sup>158</sup> For Brown, "so long as a people do not accept military conquest, so long as they can manifest, in one way or another, their inalterable will to regain their freedom, their sovereignty, even though flouted, restricted, and sent into exile, still persists."<sup>159</sup> Whatever the answer to the question, the undeniable fact remains that, in view of the

155. *Id.* at 87. The Hague Convention of 1907 and the subsequent Geneva Conventions are based on or incorporate this theory. *Id.* at 78-79, 116.

156. See J. CRAWFORD, *supra* note 17, at 102-03, 261-62, where he asserts that the effectiveness precondition to recognition of the secessionist entity is relaxed where the metropolitan State forcibly prevents self-determination. The experiences of Algeria and Guinea-Bissau are examples. *Id.* at 259-61.

157. If the effectiveness of the SADR government-in-exile is measured against the standard adopted by Marek for revolutionary governments-in-exile, see note 151 *supra*, it is clear that the SADR government-in-exile has achieved a considerable degree of effectiveness. See text accompanying notes 230-38 *infra*.

158. K. MAREK, *supra* note 129, at 589.

159. Brown, *supra* note 136, at 667.

uncertain future of the Saharan conflict, the practice States and other international institutions adopt toward recognition assumes considerable importance.<sup>160</sup>

### III. Claims Relating to Participation

In addition to formal declarations, recognition manifests itself in various forms. It may be either express or implied.<sup>161</sup> Recognition may also be said to be conditional—*i.e.*, a State may accord recognition to an entity that has not, in its view, fulfilled one of the prerequisites of statehood,<sup>162</sup> with knowledge that the other prerequisites are fulfilled and on the condition that the remaining prerequisites be achieved within a reasonable period of time.<sup>163</sup> Such was the case with United States recognition of the Czechoslovak government-in-exile during World War II.<sup>164</sup> Yet, regardless of how recognition is characterized—express as opposed to implied, conditional as opposed to unconditional—the fact remains that recognition marks a critical moment in the life of a nascent State. Recognition, in one form or another, guarantees to States and governments myriad tangible and intangible benefits—*e.g.*, ability to enter into treaty relations with third States, access to foreign courts, diplomatic privileges and immunities, opportunities for training nationals and technical assistance, opportunities for participation in institutes and conferences, status as an International Person, enhancement of international respect for the worth and viability of the entity, and security in the knowledge that other States recognize the entity's existence and will work to ensure its development and survival.

Saharan claims relating to participation raise initial questions of "statehood" and the interpretation of that concept by various international institutions. These claims will be considered under the following categories: (1) claims to membership in international organizations,

160. J. CRAWFORD, *supra* note 17, at 420.

161. Implied recognition is a delicate issue. "The question of implied recognition resolves itself into an enquiry as to the kind and type of conduct which, in the absence of clear indications to the contrary, the law will interpret as amounting to recognition." H. LAUTERPACHT, *supra* note 108, at 369. For a more complete discussion of the doctrine of implied recognition, see *id.* at 369-408; I D. O'CONNELL, *supra* note 123, at 166-77.

162. See note 110 *supra*.

163. Lauterpacht asserts that recognition can be withdrawn when the legal conditions for the recognition disappear. He indicates, however, that conditional recognition as generally understood, means "recognition the grant or continuation of which is made dependent upon fulfilment of stipulations other than the normal requirements of statehood, of governmental capacity. . . ." H. LAUTERPACHT, *supra* note 108, at 358. For a more complete discussion of the doctrine of conditional recognition, see *id.* at 357-64.

164. Because the Czech government was not duly constituted by its national assembly, the United States accorded it only provisional recognition. 6 DEP'T STATE BULL. 440 (1942).

(2) claims to membership in the U.N., and (3) claims to membership in the specialized agencies.

### A. *Claims to Membership in International Organizations*

#### 1. *The League of Arab States*<sup>165</sup>

Membership in the League is restricted to independent Arab States. Any such State has "the right" to become a member of the League.<sup>166</sup> In the traditional sense, the SADR is not yet a State, and thus the requirement would seem to preclude admission. And yet some "non-independent" Arab States, namely the Provisional Government of Algeria in 1959, have been admitted as observers, while Palestine was admitted to the League because of what the League regarded as its special status.<sup>167</sup>

If admission to the League is desired, the Frente POLISARIO conceivably could gain admittance for the SADR as an observer rather than as a member with full rights. Such a result is the most likely outcome given the considerable support that Morocco can count on from its allies.

#### 2. *The Organization of African Unity*<sup>168</sup>

Article IV of the Charter of the O.A.U. states that each independent sovereign African State shall be entitled to become a Member State of the Organization.<sup>169</sup> The legal interpretation of this article grants a right of membership provided the State pledges to adhere to the O.A.U.

165. The League of Arab States was created by the Arab League Pact of March 22, 1945. The Pact established a League Council, a Secretariat-General, and permanent committees. See generally H. HASSOUNA, *THE LEAGUE OF ARAB STATES AND REGIONAL DISPUTES* (1975).

166. Pact of the League of Arab States, art. 1, reprinted in H. HASSOUNA, *supra* note 165, at app. A.

167. In the Annex Regarding Palestine, the signatories to the Arab League Pact were of the opinion that "considering the special circumstances of Palestine and until that country can effectively exercise its independence, the Council of the League should take charge of the selection of an Arab representative from Palestine to take part in its work." Pact of the League of Arab States—Annex Regarding Palestine, reprinted in H. HASSOUNA, *supra* note 165, at app. B. Before 1964, Palestinian participation in the work of the League was sporadic, owing to confusion as to what organization legitimately represented the interests of the Palestinian people. Since the formation of the Palestine Liberation Organization (P.L.O.) in 1964, Palestinian participation in the work of the League has been continuous. H. HASSOUNA, *supra* note 165, at 264-69.

168. The O.A.U. was formed by 31 African leaders on May 26, 1963. The O.A.U. currently has 50 Member States. The principal organs of the O.A.U. are: the Assembly of Heads of State and Government, the Council of Ministers, the General Secretariat, the Specialized Commissions, the Commission of Conciliation, Mediation and Arbitration, and the Liberation Committee (Co-ordinating Committee for the Liberation of Africa). See generally K. CERVENKA, *THE UNFINISHED QUEST FOR UNITY* (1977).

169. O.A.U. CHARTER, art. 4, reprinted in K. CERVENKA, *supra* note 168, at app. 2.

Charter and to work for the achievement of the objectives therein.<sup>170</sup> O.A.U. practice has been to grant recognized liberation movements an observer status permitting representatives to participate in O.A.U. conferences without a right to vote.<sup>171</sup>

On July 4, 1980, at the O.A.U. Summit in Sierra Leone, the Frente POLISARIO, supported by sixteen African governments, applied for admission to the O.A.U. as the SADR.<sup>172</sup> Morocco and seven other States responded to the attempt by threatening to withdraw from the Organization if the SADR government-in-exile was permitted to join as a sovereign State.<sup>173</sup> To preserve the unity of the O.A.U., a four-point plan was adopted that in effect gave both sides a year to gain additional support.<sup>174</sup>

Membership in the O.A.U. would be quite desirable for the SADR. It appears, however, that the Member States, in spite of the significant number of them that have either recognized the SADR or supported the efforts of the Frente POLISARIO, will not now sacrifice the unity of the O.A.U. to make good those claims.<sup>175</sup> The Frente POLISARIO must be content with maintaining its ties to the O.A.U. through the *Ad hoc* Committee.<sup>176</sup>

## B. *Claims to Membership in the U.N.*

### 1. *Full Membership in the U.N.*

The fundamental Charter provision regarding membership in the U.N. is Article 4(1): "Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations."<sup>177</sup> The prerequisites for admission stated in Article 4(1) are authoritative and exhaustive. States are not permitted to consider other factors as preconditions to admitting a State to membership, although they are permitted to consider factors going towards the establishment of the five conditions of Article 4(1).<sup>178</sup>

170. K. CERVENKA, *supra* note 168, at 16.

171. *Id.*

172. Wash. Post, July 3, 1980, at A27, col. 5.

173. Seven States threatened to walk out as a demonstration of support for Morocco: Tunisia, Egypt, Sudan, Somalia, Cameroon, Senegal, and the Ivory Coast. N.Y. Times, July 4, 1980, at A4, col. 6.

174. *Id.*, July 5, 1980, at A4, col. 6.

175. *Id.* It was reported that the SADR had been recognized by 26 African States, giving it the majority necessary for admittance to the O.A.U. as a full Member State.

176. See note 108 *supra*.

177. U.N. CHARTER art. 4(1).

178. Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), [1948] I.C.J. 57.

Procedurally, Article 4(2) mandates that membership in the U.N. requires a favorable recommendation by the Security Council as a condition precedent followed by a majority vote of approval by the General Assembly.<sup>179</sup> Thus, admission to the U.N. turns on the interpretation of the word "State" in Article 4(1).<sup>180</sup>

The word "State" is used generally and, as its drafting history reveals, was intended to cover the broadest range of territorial communities.<sup>181</sup> U.N. practice indicates that, in the context of a claim to membership status, the traditional legal criteria of statehood are not abandoned, but rather relaxed in relation to the claim in which they are presented.<sup>182</sup> For example, Israel was admitted to the U.N. in spite of the fact that numerous Arab States and the United Kingdom initially maintained that, because the borders of Israel were not defined, it was not a "State" and its admittance as such would be improper.<sup>183</sup>

At this time, it appears doubtful that the SADR could seriously entertain any hopes of U.N. membership. The success or failure of any attempt at full membership depends in the first instance on a favorable recommendation from the Security Council. In view of recent discussions in the Fourth Committee,<sup>184</sup> it is likely that the United States would veto an SADR application.

## 2. *Limited Participation in the U.N.*

The likelihood that the Frente POLISARIO would be unsuccessful in an attempt to achieve full membership status does not preclude it from more limited forms of participation. The Frente POLISARIO has participated in U.N. functions in the past, and should continue to do so, by ensuring that issues pertinent to its existence are inserted on the provisional agenda, and by appearing before the U.N.'s main functional bodies and committees.<sup>185</sup> In addition, should the Frente

179. Competence of the General Assembly for the Admission of a State to the United Nations, [1950] I.C.J. 1.

180. Questions as to the ability and willingness of an applicant to carry out the obligations of the Charter are apparently insignificant. *See* W. REISMAN, *PUERTO RICO AND THE INTERNATIONAL PROCESS* 61-62 (1975).

181. *Id.* at 54.

182. Cohen, *Concept of Statehood in United Nations Practice*, 109 U. PA. L. REV. 1127, 1168 (1961).

183. *Id.* at 1134 nn. 27 & 28.

184. 35 U.N. GAOR, C.4 (22d mtg.) 9, U.N. Doc. A/C.4/35/SR. 22 (1980) (statement by United States representative in the Fourth Committee indicating that the United States is neutral regarding the future status of Western Sahara).

185. Appearances by Frente POLISARIO representative before the Fourth Committee in: 30 U.N. GAOR, C.4 (2170th mtg.) 218, U.N. Doc. A/C.4/30/SR. 2170 (1975); 30 U.N. GAOR, C.4 (2178th mtg.) 340, U.N. Doc. A/C.4/30/SR. 2178 (1975); 31 U.N. GAOR, C.4 (22d mtg.) 4, U.N. Doc. A/C.4/31/SR. 22 (1976); 32 U.N. GAOR, C.4 (10th mtg.) 9, U.N. Doc. A/C.4/32/SR. 10 (1977); 32 U.N. GAOR, C.4 (19th mtg.) 22, U.N. Doc. A/C.4/



POLISARIO so desire, explicit provisions for full participation by non-members exist in a number of U.N. organizations.<sup>186</sup> Many of these organizations provide for associate as well as consultative status.

### 3. *Observer Status*

There is no formal observer status to the U.N., though a proposal was made in 1950 to institutionalize such a status.<sup>187</sup> Observer status traditionally has been granted to States that are not members of the U.N. but who have joined one or more of the specialized agencies.<sup>188</sup> It may be sufficient that an entity has received invitations to participate as an observer in other international fora (such as multinational conferences) prior to acquiring observer status from the U.N. The P.L.O., for example, participated in three multinational conferences before it acquired observer status from the General Assembly. The implementing resolution entitled the P.L.O. to participate as an observer in the sessions and work of the General Assembly, all international conferences convened under the auspices of the General Assembly, and all international conferences convened under the auspices of other organs of the U.N.<sup>189</sup>

As of this writing, the Frente POLISARIO has not obtained membership status in any of the specialized agencies. A Frente POLISARIO claim to acquire "formal" observer status would likely be rejected unless, prior to raising the claim, it had obtained membership status in one of the specialized agencies.

### C. *Claims to Participate in the Specialized Agencies*

Entities that would not be considered States in relation to a claim for comprehensive participation in the U.N. might nevertheless satisfy the requirements of statehood where the claim is for limited participation. Although participation in these specialized agencies is not on the level of the comprehensive participation guaranteed to members of the U.N., membership in them does guarantee many benefits that are critical to the development of a new or nascent State.

32/SR. 19 (1977); 33 U.N. GAOR, C.4 (22d mtg.) 18, U.N. Doc. A/C.4/33/SR. 22 (1978); 33 U.N. GAOR, C.4 (30th mtg.) 16, U.N. Doc. A/C.4/33/SR. 30 (1978); 34 U.N. GAOR, C.4 (14th mtg.) 10, U.N. Doc. A/C.4/34/SR. 14 (1979); 34 U.N. GAOR, C.4 (15th mtg.) 3, U.N. Doc. A/C.4/34/SR. 15 (1979); 35 U.N. GAOR, C.4 (19th mtg.) 4, U.N. Doc. A/C.4/35/SR. 19 (1980).

186. See W. REISMAN, *supra* note 180, at 65.

187. P. BLAIR, *THE MINI-STATE DILEMMA* 41 (1967). For a discussion of the procedural issues with respect to observer status, see W. REISMAN, *supra* note 180, at 66-67.

188. W. REISMAN, *supra* note 180, at 67.

189. G.A. Res. 3237, 29 U.N. GAOR, 1 Supp. (No. 31) 4, U.N. Doc. A/9631 (1974).

### 1. *The International Labor Organization (I.L.O.)*

Article 1 of the I.L.O. Constitution establishes three means of gaining membership.<sup>190</sup> The third means allows non-members of the U.N. to be admitted to the I.L.O. by a vote of two-thirds of the members attending a session. The supporting vote must include two-thirds of the government delegates.

In the recent past, the I.L.O. has assisted national liberation movements by convening special conferences and seminars on issues pertinent to the development of labor in new States. To date, such participation has been limited to national liberation movements recognized by the O.A.U.<sup>191</sup> The Frente POLISARIO, though recognized by the Liberation Committee of the O.A.U. as the sole legitimate representative of the Saharan people,<sup>192</sup> has not been so recognized by the Assembly of Heads of State and Government. Accordingly, participation by the Frente POLISARIO in I.L.O. functions appears doubtful absent an explicit recognition of its legitimacy by the O.A.U.

### 2. *The Food and Agriculture Organization (F.A.O.)*

The F.A.O. supervises significant spending of funds of the U.N. Development Program. The F.A.O. Investment Center, working in collaboration with the World Bank and the Inter-American Development Bank, has been engaged in the commitment of many loans and credits for agricultural development and land reform. It is also a clearing-house for information on world food and commodity and trade. Membership in the F.A.O. provides important access to Bank-related activities for states that are not members of the World Bank.<sup>193</sup>

Under Article 2(2) of the F.A.O. Constitution, the Conference may, by a two-thirds majority vote, admit any "nation" that applies and undertakes to assume the obligations of membership.<sup>194</sup>

The F.A.O. has sponsored training programs for new and developing States, and was the first of the specialized agencies to admit Namibia to full membership. The F.A.O. gives a sizable amount of its funds to the national liberation movements of Southern Africa recognized by the O.A.U.<sup>195</sup> Thus, as in the case of the I.L.O., absent a formal declara-

190. I.L.O. CONST., *adopted* Oct. 9, 1946, art. 4, 62 Stat. 3485, T.I.A.S. No. 1868.

191. 34 U.N. GAOR, C.4 (20th mtg.) 7, U.N. Doc. A/C.4/34/SR. 20 (1979)(statement by I.L.O. representative).

192. U.N. Doc. A/AC.109/PV.1161 (1979)(statement by Frente POLISARIO representative).

193. W. REISMAN, *supra* note 180, at 84-85.

194. F.A.O. CONST., *entered into force* Oct. 16, 1945, art. 2(2), 12 U.S.T. 980, T.I.A.S. 4803.

195. 34 U.N. GAOR, C.4 (19th mtg.) 8, U.N. Doc. A/C.4/34/SR. 19 (1979)(statement by F.A.O. representative).

tion by the O.A.U. of the Frente POLISARIO's legitimacy, the SADR cannot expect to receive direct funding assistance from the F.A.O.

### 3. *The United Nations Educational, Scientific, and Cultural Organization (UNESCO)*

Article 2(2) of the UNESCO Constitution provides that, after having received a recommendation of the Executive Board, any State may be admitted to UNESCO after a two-thirds majority vote of the General Conference.<sup>196</sup>

UNESCO has undertaken a comprehensive program of assistance to national liberation movements. It has assumed the cost of teachers' salaries, educational supplies, training courses, and related educational projects for liberation movements in Southern Africa. However, like the I.L.O. and the F.A.O., UNESCO has extended its services only to those national liberation movements in southern Africa recognized by the O.A.U.<sup>197</sup> Again, absent a formal O.A.U. declaration of the legitimacy of the Frente POLISARIO, the SADR cannot expect to receive the direct benefits of UNESCO's vast resources.

### 4. *The World Health Organization (W.H.O.)*

Article 3 of the W.H.O. Constitution provides that membership is open to all States.<sup>198</sup> Article 6 provides that a State becomes a member of the W.H.O. after its application has been approved by a simple majority vote of the World Health Assembly.<sup>199</sup>

In May, 1979, the World Health Assembly adopted a number of resolutions on health assistance to national liberation movements recognized by the O.A.U. It has also made arrangements to allow representatives of national liberation movements recognized by the O.A.U. to participate as observers in sessions of the World Health Assembly and in W.H.O. regional meetings, and, in 1974, admitted Namibia as an associate member.<sup>200</sup> Again, absent a formal declaration of the legitimacy of the Frente POLISARIO, the SADR cannot expect to receive the direct benefits that flow from these resolutions.

196. UNESCO CONST., *done* Nov. 16, 1945, art. 2(2), 61 Stat. 2495, T.I.A.S. 1580, 3 Bevans 1311, 4 U.N.T.S. 275.

197. 34 U.N. GAOR, C.4 (19th mtg.) 10, U.N. Doc. A/C.4/34/SR. 19 (1979)(statement by UNESCO representative).

198. W.H.O. CONST., *opened for signature* July 22, 1946, Ch. III, art. 3, 62 Stat. 2679, T.I.A.S. 1808, 4 Bevans 119, 14 U.N.T.S. 185.

199. *Id.* art. 6.

200. 34 U.N. GAOR, C.4 (20th mtg.) 6, U.N. Doc. A/C.4/34/SR. 20 (1979)(statement by W.H.O. representative).

## IV. Claims to Foreign Assistance

Since the beginning of the armed conflict between the Frente POLISARIO and the Kingdom of Morocco, the claim has frequently been made that foreign States may legally assist the Frente POLISARIO in waging its war of national liberation. A thorough examination of such a claim is not within the scope of this Article. The claim will be briefly examined, however, because it could assume considerable importance in the event of a breakdown in negotiations.

A claim that foreign States may legally assist the Frente POLISARIO in its war of national liberation is thought by some to raise initial questions of intervention.<sup>201</sup> The Frente POLISARIO claim is based on the following argument:

- a) The right of the Saharwi people to self-determination has been juridically affirmed by the world community in various contexts;<sup>202</sup>
- b) Morocco's occupation of the Territory of Western Sahara is an act of aggression, according to the definition of aggression adopted by the General Assembly at its twenty-ninth session,<sup>203</sup> a violation of the principles of the U.N. Charter,<sup>204</sup> a violation of relevant General Assembly resolutions,<sup>205</sup> and an illegal act against State independence;<sup>206</sup>
- c) The struggle of peoples under alien domination for the implementation of their right to self-determination and independence is legitimate and in full accordance with the principles of international law;<sup>207</sup> and
- d) Intervention directed against a State that is guilty of an interna-

201. It is probably the case that the use of force by a non-State in exercise of a right to self-determination is legally neutral, that is, not regulated by law at all (although the *jus en bello* may well apply). What is relevant is the legality of action by other States in assisting or opposing self-determination. J. CRAWFORD, *supra* note 17, at 110.

202. For the most recent affirmation of this right, see Advisory Opinion on Western Sahara, [1975] I.C.J. 12.

203. G.A. Res. 3314, 29 U.N. GAOR, Supp. (No. 31) 142, U.N. Doc. A/9631, Annex, art. 3(a) (1974).

204. The Charter prohibits the "threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2(4). In this regard, Morocco's occupation of Western Sahara, an action in contravention of the self-determination and political independence of the Saharwi people, arguably falls within the prohibition of Article 2(4) by virtue of Article 1(2). Article 1(2) states that one of the purposes of the United Nations is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. . . ." U.N. CHARTER art. 1(2).

205. In addition to the U.N. resolutions specific to the application of the right to self-determination and independence of the Saharwi people, Morocco's actions violate the principle of Res. 2625 (XXV), *supra* note 42, that States have a duty to refrain from any action which deprives people of "their right to self-determination and freedom and independence."

206. Morocco's actions represent "a supreme attack against the highest of the internationally protected interests of a State: its existence. It therefore represents the most drastic illegality that can be committed." K. MAREK, *supra* note 129, at 554.

207. G.A. Res. 3103, 28 U.N. GAOR, 1 Supp. (No. 30) 142, U.N. Doc. A/9030 (1973).

tional wrong is not illegal.<sup>208</sup>

The traditionalist counter-argument<sup>209</sup> is that outside aid to national liberation movements is illegal. Under this view of international law, all States owe at least a duty of neutrality to the threatened government, and any State, if invited, may come to its aid.<sup>210</sup> Any other action on the part of third States would amount to a violation of the territorial integrity of the threatened government.

The traditionalist counter-argument is without force in Western Sahara because it is based on the same theoretical framework upon which legal distinctions concerning the obligations of States to governments beset by rebellions, insurgencies, and belligerencies were built.<sup>211</sup> That framework, premised on the notion of respect for the sovereignty and territorial integrity of the incumbent government, is not applicable in Western Sahara where no incumbent government can be said to exist,<sup>212</sup> and where the territory in question was never part of the national territory of Morocco.<sup>213</sup> The law applicable here concerns decolonization; it is based on the primacy of the right of colonial peoples to self-determination.<sup>214</sup>

## V. Claims Relating to Non-Recognition

The essence of non-recognition of a territorial transfer is the refusal, on the part of the non-recognizing power, to accept the acts of the dispossessing power as those of a rightful sovereign.<sup>215</sup> Where the illegality involves a norm of *jus cogens*, States have a duty under customary international law—individually and collectively—not to recognize the act as legal.<sup>216</sup>

In the context of statehood and territorial status, collective non-recognition has been adopted in the case of “illegal entities.” This duty of collective non-recognition, which first made its appearance in the Stimson Doctrine and the resolutions of the League of Nations in the Man-

208. J. BRIERLY, *THE LAW OF NATIONS* 286 (4th ed. 1949).

209. The most articulate advocate of the traditional view is Professor E. V. Rostow. See E. ROSTOW, *THE IDEAL IN LAW* 280 (1970).

210. Tyner, *Wars of National Liberation in Africa and Palestine: Self-Determination for Peoples or Territories?* 5 *YALE STUD. WORLD PUB. ORD.* 253 (1979).

211. See text accompanying notes 125-26 *supra*.

212. See notes 124, 127 *supra*.

213. The I.C.J. found no legal ties sufficient to validate Morocco's claim to Western Sahara. Advisory Opinion on Western Sahara, [1975] I.C.J. 12, 56-57.

214. *Id.* at 36.

215. R. LANGER, *SEIZURE OF TERRITORY* 96 (1974).

216. J. CRAWFORD, *supra* note 17, at 123.

churian crisis,<sup>217</sup> has more recently been invoked in the case of Rhodesia (now Zimbabwe) and Namibia.<sup>218</sup> The importance of a collective duty of non-recognition is that, more than enjoining the status of the entity in question, it underscores the illegality of the situation and helps to prevent its consolidation.<sup>219</sup>

In the context of Western Sahara, the Moroccan occupation of the territory is in direct contravention of the right of the Saharwi people to self-determination. Thus, the collective duty of non-recognition as applied to the Moroccan occupation should extend to all actions by Moroccan officials where the claim is made that they are acting in the political and/or economic interests of the Saharwi people.<sup>220</sup>

## Conclusion

Morocco's occupation of Western Sahara, contravening the right of the Saharwi people to self-determination, is not the first such preemption of self-determination in the post-colonial era. Both in West Irian in 1972 and in East Timor in 1975 a neighboring State with a territorial claim invaded the Non-Self-Governing Territory in order to prevent the colonial people from exercising their right to self-determination. The utility of belligerent occupation as a means of defeating claims to self-determination was put to the test in both instances with results that make the case of Western Sahara all the more important to the vindication of the principles of self-determination embodied in Resolution 1514(XV).

Military action by the Republic of Indonesia against West Irian irre-

217. *Id.* at 122. See also, R. LANGER, *supra* note 215, at 50-74; Garner, *Non-recognition of Illegal Territorial Annexations and Claims to Sovereignty*, 30 AM. J. INT'L L. 679 (1936).

218. In the case of Rhodesia, non-recognition was enforced through sanctions under Chapter VII of the Charter. See 20 U.N. SCOR, Resolutions and Decisions 8, U.N. Doc. S/Res/217 (1965); 23 U.N. SCOR, Resolutions and Decisions 5, U.N. Doc. S/Res/253 (1968); 25 U.N. SCOR, Resolutions and Decisions 5, U.N. Doc. S/Res/277 (1970). In the case of Namibia, the I.C.J., *inter alia*, held that the duty of non-recognition implied abstention from economic and other relationships or dealings with South Africa on behalf of or concerning Namibia which might entrench South African authority over the territory. Advisory Opinion on Namibia, [1971] I.C.J. 16.

219. H. LAUTERPACHT, *supra* note 108, at 412. Non-recognition is only a precondition for other enforcement action and a method of asserting the values involved in the relevant legal rules. It is not a sanction in and of itself. J. CRAWFORD, *supra* note 17, at 122-23.

220. This should include claims of authority to sell phosphate extracted from the mines at Bu Craa. Early in 1979, it was reported that the Bu Craa mine operated by FOS-BUCRAA had resumed production under heavy guard. The mine had been closed since 1976. 34 U.N. GAOR, 2 Supp. (No. 23) 114, U.N. Doc. A/AC.109/L. 1331 (1979). Moreover, on January 4, 1979, Hassan II named a Secretary of State for Saharan Affairs and three new governors for the so-called "provinces" of the Sahara. *Id.* at 110.

versibly defeated the West Irians' claim to self-determination.<sup>221</sup> The General Assembly subsequently sealed their fate in Resolution 2504(XXIV).<sup>222</sup> Indonesian occupation and annexation of East Timor<sup>223</sup> has thus far served to deny the indigenous population their right to self-determination,<sup>224</sup> and has resulted in a situation where many States now consider East Timor a matter within the domestic jurisdiction of Indonesia.<sup>225</sup> Yet, in spite of the consolidation and stabilization of Indonesian control in East Timor, the General Assembly has continued to voice its support for the right of the people of East Timor to self-determination and independence, endorsing the legitimacy of their struggle to realize that right.<sup>226</sup>

Nevertheless, formalistic adherence to the principles of Resolution

221. Agreement between the Republic of Indonesia and the Kingdom of the Netherlands Concerning West New Guinea (West Irian), Aug. 15, 1962, 437 U.N.T.S. 273, *reprinted in* 17 U.N. GAOR, 3 Annexes (Agenda Item 89) 1, U.N. Doc. A/5170, Annex (1962). The agreement ended the hostilities between the two States and laid the foundation for the "act of free choice" held in West Irian in 1969.

222. G.A. Res. 2504, 24 U.N. GAOR, Supp. (No. 30) 3, U.N. Doc. A/7630 (1969).

223. The island of Timor is located at the tip of the chain of islands that forms the Republic of Indonesia. The western part of the island, known as Timor Barat, has always been part of Indonesia. East Timor, the area formerly under Portuguese administration, totals 14,925 square kilometers. 1979 Report of the Special Committee on Decolonization, *supra* note 7, at 118.

224. In July, 1975, the Portuguese government adopted a law providing for the formation of a transitional government in East Timor to prepare for the election of a popular assembly in October, 1976 and the eventual termination of Portuguese sovereignty in October, 1978. *Id.* In December, 1975, however, Indonesian naval, air, and land forces invaded East Timor. 30 U.N. SCOR, Supp. (Oct.-Dec. 1975) 53, U.N. Doc. S/11899 (1975). There followed a period of intense armed conflict between the Frente Revolucionaria de Timor Leste Independente (FRETILIN), which had, on November 28, 1975, declared the formation of an independent East Timorese State, and the armed forces of Indonesia, aided by pro-Indonesian parties: the Associacao Popular Democratica de Timor (APODETI), the Uniao Democratica Timorense (UDT), the Klibur Oan Timor Asaiain (KOTA), and the Partido Probalhista. On July 17, 1976, the President of Indonesia promulgated law 7/76 providing for the integration of East Timor into the Republic of Indonesia and the establishment of East Timor as the twenty-seventh province of Indonesia. 1979 Report of the Special Committee on Decolonization, *supra* note 7, at 120.

225. Apparently, Indonesia has successfully consolidated its control over East Timor. In response to this situation, the governments of many States, in particular those close to East Timor, have accepted the integration of East Timor into Indonesia as irreversible and, in some cases, have extended *de facto* recognition to the annexation. 1979 Report of the Special Committee on Decolonization, *supra* note 7, at 121-22. For the distinction between belligerent occupation and *de facto* government, see note 138 *supra*.

226. G.A. Res. 33/39, 33 U.N. GAOR, Supp. (No. 45) 181, U.N. Doc. A/33/45 (1978). It is not altogether clear that all members of the international community have given legal effect to Indonesia's illegal actions. On May 20, 1979, an International Seminar on East Timor, held in Lisbon, decided to request the Portuguese government to start a diplomatic campaign centered at the U.N. seeking the implementation of relevant General Assembly and Security Council resolutions, particularly those calling for the immediate withdrawal of Indonesian military forces and a visit to East Timor by a special representative of the Secretary-General. 1979 Report of the Special Committee on Decolonization, *supra* note 7, at 122-23.

1514(XV) does not guarantee their effective realization. One may appropriately view the resolution of the Saharan conflict as a crucial instance in the development of international law and practice under Resolution 1514(XV) and a signal opportunity for the members of the international community to stand up and be counted regarding the proper community response to belligerent occupation in opposition to self-determination. Moreover, the importance of this case to those remaining Non-Self-Governing Territories should not be overlooked.

The six-nation subcommittee of the O.A.U. *Ad hoc* Committee continued its efforts to resolve the Saharan dispute into 1980. On July 5, 1980, at the O.A.U. summit in Sierra Leone, in the midst of a divisive effort to seat the Frente POLISARIO as the SADR,<sup>227</sup> a four-point plan was adopted that in effect gave supporters of both the Frente POLISARIO and Morocco a year to gain additional support.<sup>228</sup> In September, 1980, pursuant to the Sierra Leone accord, the six-nation panel proposed a fair and general election and a U.N. supervised cease-fire as a solution to the dispute.

During the eighteenth ordinary session of the Assembly of Heads of State and Government of O.A.U. held at Nairobi from June 24 to 27, 1981, King Hassan II reportedly announced that he was prepared to agree to a cease-fire in Western Sahara and to a referendum under international supervision. The Assembly of Heads of State and Government subsequently accepted the reports and recommendations of the fifth and sixth sessions of the *Ad hoc* Committee of Heads of State on Western Sahara and decided to set up an Implementation Committee to ensure, with the cooperation of the concerned parties, the implementation of the recommendations of the *Ad hoc* Committee.<sup>229</sup>

On November 11, 1980, the General Assembly adopted its most recent resolution on Western Sahara.<sup>230</sup> It reaffirmed the inalienable right of the Saharwi people to self-determination and independence, and, in a further recognition of the legitimacy of the Frente POLISARIO, specifically urged Morocco and the Frente POLISARIO

227. See text accompanying notes 172-76 *supra*.

228. Decision Adopted at the Seventeenth Ordinary Session of the Assembly of Heads of State and Government of the Organization of African Unity, O.A.U. Doc. AHG/Dec. 118(XVII), reprinted in U.N. Doc. A/35/529, Annex (1980).

229. Working paper on Western Sahara, prepared by the Secretariat, U.N. Doc. A/AC.109/667 (1981). The State Members of the Implementation Committee are Guinea, Kenya, Mali, Nigeria, Sierra Leone, Sudan, and the United Republic of Tanzania.

230. G.A. Res. 35/19, 35 U.N. GAOR, Supp. (No. 48) —, U.N. Doc. A/35/48 (1980), text reprinted in Resolutions and Decisions Adopted by the General Assembly During the First Part of its Thirty-Fifth Session 362-63, U.N. Doc. GA/6375 (1981).



to enter into direct negotiations to arrive at a definitive settlement in Western Sahara.

Hostilities continue in Western Sahara between the Saharwi People's Army of the Frente POLISARIO and the Army of Morocco while the Frente POLISARIO and the SADR government-in-exile have secured significant diplomatic and domestic victories.<sup>231</sup> On the diplomatic front, the SADR government-in-exile has been recognized by, and has established diplomatic relations with forty-four countries of Asia, Africa, and Latin America;<sup>232</sup> the Frente POLISARIO has been recognized as the legitimate representative of the Saharan people by over one hundred national and international institutions.<sup>233</sup> On the domestic front, the SADR government-in-exile and the Frente POLISARIO have established primary and secondary schools, literacy and vocational training courses, dispensaries, and hospitals.<sup>234</sup> In addition, four National POLISARIO Congresses have thus far been held.<sup>235</sup> From all appearances, the SADR is well on its way towards establishing and maintaining the governmental institutions necessary for the rapid development of a heretofore deprived population.

Yet, a partial victory is really no victory at all. The coming months will prove to be critical to the future of the SADR and its government-in-exile. The O.A.U. Implementation Committee has already begun preparations for the referendum in Western Sahara, an event that King Hassan II maintains could occur as early as November, 1981.<sup>236</sup>

Consideration of the Saharan conflict by the O.A.U. should not be viewed as a bar to further affirmative action by the U.N., its specialized agencies, and third States. In this regard, it must be repeated that the SADR has, as of this writing, been recognized by forty-four States. This fact reflects the willingness of a significant segment of the world community to see the decolonization process in Western Sahara to the

231. See N.Y. Times, Aug. 8, 1980, at A13, col. 5; Wash. Post, Aug. 24, 1980, at A12, col. 3.

232. Working paper on Western Sahara prepared by the Secretariat, U.N. Doc. A/AC.109/667 (1981).

233. U.N. Doc. A/AC.109/PV.1161 (1979)(statement by Frente POLISARIO representative before the Fourth Committee).

234. 35 U.N. GAOR, C.4 (19th mtg.), U.N. Doc. A/C.4/35/SR. 19 (1980).

235. First National POLISARIO Congress, May 10, 1973, *reported in* Report of the Visiting Mission to Spanish Sahara, *supra* note 3, at 63; Second National POLISARIO Congress, Aug. 25-31, 1974, *reported in* 32 U.N. GAOR, C.4 (19th mtg.) 25, U.N. Doc. A/C.4/32/SR. 19 (1977); Third National POLISARIO Congress, Aug. 26-30, 1976, *reported in* 31 U.N. GAOR, C.4 (22d mtg.) 10, U.N. Doc. A/C.4/31/SR. 22 (1976); Fourth National POLISARIO Congress, Oct. 1978, *reported in* 1979 Report of the Special Committee on Decolonization, *supra* note 7, at 111.

236. Working paper on Western Sahara prepared by the Secretariat, U.N. Doc. A/AC.109/667 (1981).

conclusion deemed just by advocates of self-determination in the decolonization process. Yet further action is necessary. The following course of action is, in the author's view, a reasonable, legally sound response to Morocco's belligerent occupation, and an appropriate means of ensuring the effective realization of the right of the Saharwi people to self-determination:

- 1) Recognition of and establishment of diplomatic relations with the SADR by those States that have not already done so;
- 2) Lobbying efforts by those States that have either recognized the SADR or support the Frente POLISARIO to ensure these entities' access to and participation in the benefits of programs conducted by F.A.O., UNESCO, and W.H.O., in spite of the absence of a formal recognition of legitimacy by the O.A.U.;<sup>237</sup>
- 3) Non-recognition of Morocco's asserted authority to carry on economic and other dealings with third States in the interest of, or on behalf of the Saharwi people, particularly with respect to the sale of phosphates extracted from the mine at Bu Craa.

In the event of Moroccan recalcitrance regarding the work of the O.A.U. Implementation Committee, the following course of action, in addition to the three steps mentioned above, is an appropriate means by which to ensure the complete decolonization of Western Sahara:

- 1) The Fourth Committee and the General Assembly should initiate discussions with a view towards granting observer status to the Frente POLISARIO on terms similar to those granted to the P.L.O.;
- 2) The twenty-six Member States of O.A.U. that have recognized the SADR give it the majority necessary to gain membership in the Assembly as a sovereign State;<sup>238</sup> and, accordingly, at the 19th O.A.U. Summit, those States should initiate an attempt to seat the SADR as a full member;
- 3) Should hostilities escalate between Morocco and the Frente POLISARIO, third States may legally provide the Frente POLISARIO with the military assistance necessary to continue its war of national liberation, with the understanding that assistance in the form of combat personnel is prohibited.<sup>239</sup>

237. See note 191 *supra*.

238. N.Y. Times, July 5, 1980, at A4, col. 6.

239. Non-intervention as a peremptory norm in this type of conflict is both unenforceable and unacceptable. Intervention on behalf of, or more appropriately, foreign military assistance to the Frente POLISARIO, should be limited to any type or quantity of assistance not involving foreign personnel in actual combat. Such a prohibition does not preclude, for example, staffing training centers or advising the indigenous high command. Farer, *Intervention in Civil Wars: A Modest Proposal*, 67 COLUM. L. REV. 266, 276 (1967). The view that self-determination requires that outside assistance never be given to any faction conceals the naive assumption that whatever takes place within the confines of a territorial entity is pursuant to genuine self-determination of peoples and that outside "intervention" is

Although the law of decolonization is not well-defined and State practice in matters of decolonization varies depending on both the international interest in the Non-Self-Governed Territory in question and the specific State interest at stake, the case of Western Sahara offers an opportunity for introducing greater predictability in this area. The international community, having recognized, and juridically affirmed, the right of a colonial people to self-determination must act to vindicate that right.

Recognition by the I.C.J. of the right of the Saharwi people to self-determination should not be narrowly construed as the foundation on which the arguments and conclusions in this Article rest. The I.C.J. affirmed the right of the Saharwi people to self-determination; indeed, the right to self-determination for all colonial peoples. This right has been the driving force behind the activities of the Fourth Committee. Therefore, the conclusions reached herein are applicable in any situation where, at a minimum, the right of a specific colonial people of a Non-Self-Governing Territory to self-determination has been recognized and affirmed in the activities of the General Assembly and the Fourth Committee. The case of Western Sahara merely represents the strongest case for the application of these conclusions.

The vitality of Resolution 1514(XV) and the future of the decolonization movement turn, in part, on the outcome of the Western Sahara conflict. Belligerent occupation in opposition to self-determination cannot be permitted to become a viable alternative for those States that would raise territorial claims to a Non-Self-Governing Territory.

necessarily disruptive of self-determination. Such a view confuses self-determination of entities with genuine self-determination of peoples. Moore, *The Lawfulness of Military Assistance to the Republic of Vietnam*, 61 AM. J. INT'L L. 1, 30 (1967).